UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

--X

JFURTI, LLC, and JACOB FRYDMAN, Suing Individually and Derivatively and On Behalf of All Similarly Situated Limited Partners and Shareholders in the Name and Right of FIRST CAPITAL REAL ESTATE TRUST INCORPORATED and FIRST CAPITAL REAL ESTATE OPERATING PARTNERSHIP, L.P.,

Plaintiffs,

- against –

FORUM PARTNERS INVESTMENT MANAGEMENT, LLC et al.,

Defendants,

- and -

FIRST CAPITAL REAL ESTATE TRUST INCORPORATED and FIRST CAPITAL REAL ESTATE OPERATING PARTNERSHIP L.P.,

Nominal Derivative Defendants.

--X

Civil Action No. 16-cv-08633 (CM)

MEMORANDUM OF LAW OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

Dated: March 24, 2017

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INTRODUCTION

Plaintiffs JFURTI, LLC ("JFURTI") and Jacob Frydman ("Frydman," and together with JFURTI, "Plaintiffs"), respectfully submit this memorandum of law in opposition to the pre-Answer motions to dismiss of (1) Defendants First Capital Real Estate Trust Incorporated ("First Capital REIT"), First Capital Real Estate Operating Partnership, L.P. ("First Capital OP" or "the Operating Partnership"), Presidential Realty Corporation ("Presidential REIT"), Presidential Realty Operating Partnership ("Presidential OP"), Suneet Singal ("Singal"), Javier Vande Steeg ("Steeg"), Michael McCook ("McCook"), Frank Grant ("Grant"), Richard Leider ("Leider"), First Capital Real Estate Advisors, LP ("First Capital Advisor"), First Capital Real Estate Investments, LLC ("FCREI"), First Capital Borrower, LLC ("First Capital Borrower"), and United 25250 Tilden, LLC ("Tilden," and together with Singal, Steeg, McCook, Grant, Leider, First Capital Advisor, FCREI and First Capital Borrower, the "FC Defendants"), and (2) Defendants Forum Partners Investment Management, LLC ("Forum"), Russell C. Platt ("Platt"), and Marble 15 SCS ("Marble," and together with Forum and Platt, the "Forum Defendants"), (the Forum Defendants, the FC Defendants, Presidential REIT and Presidential OP collectively referred to herein as "Defendants," and each as "Defendant"). For purposes of this motion, Plaintiffs incorporate by reference the allegations contained in the First Amended Complaint ("FAC") and the Amended RICO Case Statement (the "Case Statement").

PRELIMINARY STATEMENT

Contrary to Defendants' diatribe about the number of lawsuits filed by Plaintiffs to protect their rights,[1] Plaintiffs are in fact the serial victims of a relentless series of related and continuing frauds. Defendants' rhetoric cannot deny or camouflage their own cognizable misconduct or the enormous harm they have caused to First Capital REIT, First Capital OP and Plaintiffs. Through carefully sequenced misrepresentations, diversions, dissipations and sham transactions, Defendants defrauded Plaintiffs into entering into a transaction, and then fraudulently extracted and siphoned away over $100 million in assets from First Capital REIT and First Capital OP for little or no consideration.

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[1] Notwithstanding Defendants' myriad of references (unsupported by any submission on personal knowledge) to eight (8) separate actions filed by Plaintiff, in truth there is only one (1) other pending lawsuit, which is against three of the Defendants for summary judgment in lieu of

In simple terms, Defendant Singal and his various affiliated entities acquired control of First Capital REIT, First Capital OP and the advisor, property manager and other affiliates of the REIT from Plaintiffs by grossly misrepresenting to First Capital REIT and its shareholders, First Capital OP and its limited partners, and Plaintiffs, the value of certain real estate assets and contract rights that they were contributing to First Capital OP. Among other things, Singal and his affiliated entities misrepresented that they were the owners of certain assets, that they had the contractual right to acquire 100% of the ownership interests in certain assets, and that the assets were free and clear of liens, when they knew full well that their representations were entirely false and untrue. Once they had acquired control of the purchased properties, these Defendants diverted away from the derivative defendants at least $17 million in public financing raised by the REIT. Over the next 12 months, they defaulted on three consecutive occasions on their obligation to make the required monetary payments to Plaintiffs.

And when, in an effort to save the deal from collapse, Plaintiffs restructured the sale documents in a June 2016 Settlement Agreement, Singal and the other Defendants defaulted almost immediately on their obligations under that Settlement Agreement. Within 45 days of

complaint on a promissory note and guarantee in the New York Supreme Court. And the action before Judge Koetl of this Court to which Defendants devote so much attention in their papers is an unrelated action between Frydman and a former business partner who stole proprietary information and created defamatory websites.

entering into the Settlement Agreement, Singal announced in a public disclosure under Rule 8K of the Securities and Exchange Act of 1934 that First Capital REIT was going to sell substantially all of its assets and those of First Capital OP to Presidential REIT, an insolvent REIT, for little or no consideration, and would enter into a series of advisor and management agreements with Presidential REIT that would render insolvent the various obligors to Plaintiff JFURTI on the purchase money note and guarantees. Singal oversaw the transfer of $800,000 from First Capital REIT to Presidential REIT in connection with the proposed transaction, and arranged to acquire control of a majority of the outstanding voting shares of stock of Presidential REIT. (Since that time, Presidential Realty has confirmed in a series of public announcements and 8-K filings that Presidential Realty will be trading limited partnership units for real estate assets in a reverse merger transaction with First Capital REIT.) At the same time, led by Singal, Defendants transferred away from First Capital OP and First Capital REIT to the Forum and Presidential Defendants income from various properties belonging to the derivative defendants.

This is the background against which Defendants attempt to paint a picture of Plaintiff Frydman as a serial litigator who "fail[s] to satisfy the most basic pleading requirements for bringing a derivative action" and has "filed eight separate actions in both state and federal courts pertaining to these issues in his attempt to drive up Defendants' expenses and put a stranglehold on their businesses." Singal MTD pp. 1-2. As demonstrated herein, this is complete nonsense.

Defendants' respective motions are replete with factual and legal misstatements that require that the motions be denied. Throughout their motion papers, Defendants confuse the legal relationship between First Capital REIT and First Capital OP as that relationship is set forth in the First Amended Complaint, simply ignore the applicable laws in this Circuit governing derivative actions, and misstate the manner in which the Defendants' fraudulent scheme impacted the owners of First Capital REIT and First Capital OP. For example, both motions are premised on a fundamental misunderstanding of the structure of an umbrella partnership real estate investment trust (commonly referred to as an "UPREIT") such as derivative defendant First Capital REIT. Nowhere in their papers do Defendants demonstrate any understanding that First Capital REIT, a corporation that owns and operates real property and assets through its operating partnership subsidiary, First Capital OP, is a tax pass through structure that can only act through First Capital OP. It is a matter of simple definition that in an UPREIT structure like the one at issue in this case, all of the REIT's assets are indirectly owned through the umbrella partnership of the REIT, and the REIT directly owns only interests in that partnership. (This allows the REIT to act as a tax pass through entity and avoid double taxation.) The REIT's pro rata share of the assets and income of the operating partnership is treated as its own assets and income, with the result that shareholders of the REIT are directly impacted and harmed by the type of fraud alleged to have been committed by the Defendants here with respect to the assets contributed to and removed from the operating partnership of the REIT.

Defendants' factual mistakes with respect to the inter-relationship of the two derivative defendants are compounded by their failure even to address in their papers the settled law in this Circuit upholding double derivative claims of the type pleaded in the FAC. As discussed below at pages 27-29, the courts in New York, Delaware and Maryland all recognize that a shareholder may bring suit not only for wrongs inflicted on the corporation in which he holds stock, but also for wrongs inflicted on that corporation's fully controlled subsidiary which impact the parent corporation and its shareholders. For this reason, all of the arguments advanced by Defendants regarding Plaintiffs' supposed lack of standing to sue on behalf of First Capital OP are without legal merit and should be summarily rejected. The same defect exists with respect to

Defendants' argument that Plaintiffs have failed to make demand on the board of First Capital REIT or to allege that it would be futile to do so. The FAC alleges that Plaintiffs did make demand on the board, on numerous occasions, and the demands were ignored, a fact that under the applicable law obviates the need to allege further facts showing demand futility (which in any event has been sufficiently alleged).

These are not insignificant defects in Defendants' papers and, as shown below, they infect and undermine Defendants' entire discussion of the RICO and securities law claims in the FAC as well as the state law claims. The FAC explains in detail how Singal misrepresented the value of the assets he contributed to First Capital OP in order to fraudulently obtain units in the operating partnership, giving rise to a derivative federal securities law claim. The FAC also alleges in detail how Defendants engaged in a carefully planned ongoing fraudulent scheme regarding assets that were diverted or secreted away from First Capital REIT and First Capital OP, giving rise to a derivative RICO claim. And the FAC clearly alleges cognizable state law claims that form part of the same case or controversy as these federal causes of action.

For all these reasons, and the ones set forth below, Defendants' Motions to Dismiss should be denied in their entirety.

ARGUMENT

I. Standard

Rule 12(b)(6) motions are regarded "with great disfavor and are rarely granted." *Stern v. Gen. Elec. Co.*, 1991 U.S. Dist. LEXIS 19091, at *12 (S.D.N.Y. Jan. 14, 1992) (citing *Intake Water Co. v. Yellowstone River Compact Commc'n*, 590 F. Supp. 293, 296 (D.C. Mont. 1983), *aff'd*, 769 F.2d 568 (9th Cir. 1985), *cert. denied*, 476 U.S. 1163 (1986)). In deciding a motion to dismiss pursuant to Rule 12(b)(6), "the Court accepts the factual allegations made in the Complaint as true and draws all inferences in favor of the non-moving party." *Diallo v. New*

York Hotel & Motel Trades Council, 2007 U.S. Dist. LEXIS 12790, at *4, 2007 WL 510099 (S.D.N.Y. Feb. 13, 2007). The Court may consider '"any written instrument attached to the complaint, statements or documents incorporated into the complaint by reference, legally required public disclosure documents filed with the SEC, and documents possessed by or known to the plaintiff and upon which it relied in bringing the suit.'" *SEC v. Lee*, 720 F. Supp. 2d 305, 321 (S.D.N.Y. 2010) (citation omitted). Courts may also consider "RICO case statement submitted pursuant to the district court's Standing Order." *See Commercial Cleaning Servs. v. Colin Serv. Sys., Inc.*, 271 F.3d 374, 378 (2001) (citing *McLaughlin v. Anderson*, 962 F.2d 187, 189 (2d Cir. 1992)).

Rule 8(a) requires only enough facts to '"state a claim to relief that is plausible on its face,"' meaning "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Plaintiffs should be afforded latitude when pleading intent, acts and omissions of derivative defendants when "almost all possible evidentiary data with respect to the areas of permissible inquiry.... [are] within the exclusive possession of defendants." *Parkoff v. General Telephone & Electronics,* 53 N.Y.2d 412, 417, 425 N.E.2d 820, 822, 442 N.Y.S.2d 432, 434 (1981).

Rule 9(b) must be read in harmony with Rule 8(a), which requires only a short and plain statement of the facts and allegations. *See Felton v. Waltson & Co.*, 508 F.2d 577, 581 (2d Cir. 1974) ("[i]n applying rule 9(b) we must not lose sight of the fact that it must be reconciled with rule 8 which requires a short and concise statement of claims"). In ruling on a motion to dismiss under Rule 9(b), "the court must read the complaint generously…draw[ing] all inferences in favor of the pleader" and must "deny a motion to dismiss under Rule 9(b) as long as some of the allegations of fraud are adequate." *Center Cadillac v. Bank Leumi Trust Co.*, 808 F. Supp. 213, 228-29 (S.D.N.Y. 1992) (citation omitted), *aff'd*, 99 F.3d 401 (2d Cir. 1995).

A complaint is sufficient under Rule 9(b) so long as it "gives enough information to enable defendants to frame a responsive pleading and assures that a sufficient basis exists for the allegations made." *Id.* '"Rule 9(b) does not require that a complaint plead fraud with the detail of a desk calendar or a street map. Nor should the word "particularity" be used as a talisman to dismiss any but a finely detailed fraud allegation…."' *Bangkok Crafts Corp. v. Capitolo di San Pietro in Vaticano*, 2006 U.S. Dist. LEXIS 49161, at *13 (S.D.N.Y. July 7, 2006) (quoting *Gelles v. TDA Indus., Inc.*, 1991 U.S. Dist. LEXIS 3135, at *6 (S.D.N.Y. Mar. 18, 1991)). Fraud allegations subject to Rule 9(b) need only be "sufficiently specific … to give defendants adequate notice of the claims against them for fraud and fraudulent intent, and to prepare an effective defense." *Sears Petroleum & Transp. Corp. v. Ice Ban Am., Inc.*, 2004 U.S. Dist. LEXIS 6661, at *28 (N.D.N.Y. Apr. 15, 2004).

Not every element of a fraud-based claim is subject to Rule 9(b)'s heightened pleading standard. Only "averments" of fraudulent conduct need be pled with particularity. *Spira v. Nick*, 876 F. Supp. 553, 560 n.4 (S.D.N.Y. 1995) ("Rule 9(b) applies only to the averments of fraud"). In the context of complex civil RICO actions, "Rule 9(b) does not require that the temporal or geographic particulars of each mailing or wire transmission made in furtherance of the fraudulent scheme be stated with particularity." *In re Sumitomo Copper Litig.*, 995 F. Supp. 451, 456 (S.D.N.Y. 1998). Rather, in such cases, the plaintiff only need "delineate, with adequate particularity in the body of the complaint, the specific circumstances constituting the overall fraudulent scheme." *Id.* "The law requires only that each defendant be apprised of the circumstances surrounding the fraudulent conduct with which he or she stands charged . . . ."

Elsevier Inc. v. W.H.P.R., Inc., 692 F. Supp. 2d 297, 304-05 (S.D.N.Y. 2010) (citing *Dietrich v. Bauer*, 76 F. Supp. 2d 312, 329 (S.D.N.Y. 1999)). Where mailings and wire communications are relied upon as jurisdictional elements of predicate acts, but are not themselves alleged to be fraudulent, the communications need not be pled with particularity. *See Spira*, 876 F. Supp. at 559 ("[o]nce the plaintiff alleges with particularity the circumstances constituting the fraudulent scheme, neither the reputational interests nor the notice function served by Rule 9(b) (internal footnote omitted) would be advanced in any material way by insisting that a complaint contain a list of letters or telephone calls").

Moreover, "[d]espite the generally rigid requirement that fraud be pleaded with particularity, allegations may be based on information and belief when facts are peculiarly within [First Capital] opposing party's knowledge." *Wexner v. First Manhattan Co.*, 902 F.2d 169, 172 (2d Cir. 1990). "[W]here the information regarding the particular communication lies within the peculiar knowledge of defendants and might be gleaned from subsequent discovery, a plaintiff cannot be required to identify all of the dates and particulars of the alleged communications." *Square Mktg., Inc. v. Sipex Corp.*, No. 97-CV-0924 (GLG), 1997 U.S. Dist. LEXIS 12723, *12 (D. Conn. Aug. 22, 1997) (citation omitted).

II. **The FAC Properly Pleads the RICO 1962(c) Count**

The FAC and Case Statement describe each of the RICO Defendants' participation in the pattern of racketeering. Defendants predictably argue that the Derivative Plaintiffs are "dressing up" an ordinary business dispute as a RICO lawsuit. But as set forth in the FAC, the Derivative Plaintiffs assert viable Section 1962(c) and 1962(d) claims based on defendants' continuing operation of the Enterprise, including the fraudulent siphoning of over $100 million in assets from First Capital REIT and First Capital Operating Partnership for their personal benefit and to the detriment of First Capital REIT and its shareholders, as well as First Capital Operating Partnership and its limited partners.

A. Pleading Standard for RICO Pattern of Racketeering

Section 1962(1) defines "racketeering activity" as certain criminal acts under state and federal law including mail fraud, 18 U.S.C. § 1341, and wire fraud, 18 U.S.C. § 1343. *See* 18 U.S.C. § 1961(1)(B) (2017). The statute requires a plaintiff to plead at least two predicate acts to constitute a pattern of racketeering. *Id.* at § 1961(5). "A complaint alleging mail and wire fraud must show (1) the existence of a scheme to defraud, (2) defendant's knowing and intentional participation in the scheme, and (3) the use of interstate mails or transmission facilities in furtherance of the scheme." *S.Q.K.F.C., Inc. v. Bel Atl. TriCon Leasing Corp.*, 84 F.3d 629, 633 (2d Cir. 1996).

"[I]n cases where the plaintiff claims that mail and wire fraud took place in furtherance of a larger scheme to defraud, the communications themselves need not have contained false or misleading information." *Stein v. N.Y. Stair Cushion Co.*, 2006 U.S. Dist. LEXIS 8410, at *14-15 (E.D.N.Y. Feb. 10, 2006). "Rule 9(b) is satisfied so long as the alleged mailing and wire transfers 'further an underlying scheme that itself has a fraudulent, deceptive purpose." *Id.* at *15. Therefore, "even 'innocent' mailing or wire transfers may constitute predicate acts so long as they are part of the execution of the scheme.'" *Id.* (citation omitted) Indeed, '"it is not necessary to allege . . . that the defendants have personally used the mails or wires; it is sufficient that a defendant 'causes' the use of the mails or wires.'" *Breslin Realty Dev. Corp. v. Schackner*, 397 F. Supp. 2d 390, 399 (E.D.N.Y. 2005). "The fact that a third party may have caused the use of the mails [or wires] does not render the pleading defective, so long as 'the defendants could reasonably have foreseen that the third-party would use the mails in the ordinary course of business as a result of defendants' acts." *Id.* (quoting *United States v. Bortnovsky*, 879 F.2d 30, 36 (2d Cir. 1989)).

B. The FAC Describes Each RICO Defendant's Commission of the Requisite Predicate Acts

Defendants take a self-servingly narrow view of the allegations in the FAC outlining the pattern of racketeering by which the Enterprise was conducted. Defendants would have the Court confine its analysis to only the language in the RICO count itself [¶¶148-173], while ignoring the ample allegations of the FAC as further specified in the Amended RICO Case Statement. [Dkt. 32]. However, in assessing the Motions, the Court may take into account all of the allegations in the FAC – not just those within the counts themselves – as well as the detail provided in the Plaintiffs' Amended RICO Case Statement. *See Baxter v. A.R. Baron & Co.*, 1996 U.S. Dist. LEXIS 15098, at *34-36 (S.D.N.Y. Sep. 30, 1996) ("The RICO Case Statement is read together with the complaint on a motion to dismiss a RICO claim….") (citing *McLaughlin v. Anderson*, 962 F.2d 187, 189 (2d Cir. 1992)); *see also Mackin v. Auberger*, 59 F. Supp. 3d 528, 541 (W.D.N.Y. 2014) ("However, the Second Circuit Court of Appeals directs that a RICO case statement should be read together with a complaint on a motion to dismiss.").

Defendants also argue that the Derivative Plaintiffs improperly rely on "group pleading" and allegations made "on information and belief" to particularize the predicate acts and corresponding perpetrators. On its face, however, the narrative provided in the FAC and Case Statement "gives enough information to enable defendants to frame a responsive pleading and assures a sufficient basis exists for the allegations made." *Center Cadillac*, 808 F. Supp. at 228. As Plaintiffs allege, "[t]he Enterprise used U.S. mail, telephone, e-mail and the internet among other means of communications in furtherance of their Fraudulent Scheme" [Case Statement p.

48], and "[t]he Enterprise used wire transfers to send and receive funds in further of their Fraudulent Scheme." *Id.*

Many of these wire transfers and communications are detailed in the FAC and Case Statement. In most instances, Plaintiffs provide the dates, senders and recipients for these predicate acts. [Case Statement pp. 31-41] Similarly, for wire transfers, Plaintiffs also provide the exact amount of the transfers, the recipients' addresses, and, when available, the MAD Fed reference number for the transfers. *Id.* Importantly, however, Plaintiffs allege that "[e]vidence of additional communications and/or wire transactions [is] within Defendants' possession and control." [Case Statement p. 48] "Through discovery, Plaintiffs expect to obtain additional evidence of communication and/or wire transactions by the Enterprise." *Id.* In such situations, a more relaxed pleading standard rightly applies, as the exact details regarding defendants' use of the wires and mails in furtherance of their unlawful scheme "are peculiarly within the Opposing party's knowledge." *Wexner*, 902 F.2d at 172. As such, "a plaintiff cannot be required to identify all the dates and particulars of the alleged communications." *Celpaco*, 686 F. Supp. at 991.

As discussed demonstrated below, the FAC and Case Statement establish with more than enough detail that each defendant committed or caused to be committed two or more predicate acts from Spring 2016 through the present.[2]

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[2] The Presidential-FC Defendants' argument that Plaintiffs RICO claims are barred by the PSLRA is addressed in Section V, *infra*. In recognition of that challenge, the predicate acts outlined in this section encompass only acts of wire and mail fraud that are not, in any way, arguably related to conduct "actionable as fraud in the purchase or sale of securities." *Serra v. Banco Santander P.R.*, 747 F.3d 1, 4 (2d Cir. 2011); *see also MLSMK Inv. Co. v. JP Morgan Chase & Co.*, 651 F.3d 268, 280 (2d Cir. 2011) ("[T]he PSLRA's RICO Amendment, 18 U.S.C. § 1964(c), bars a plaintiff from asserting a civil RICO claim premised upon predicate acts of securities fraud.").

1. The FC Defendants

a. Defendant Singal

Defendant Singal is the CEO and Chairman of First Capital REIT, the control person of the FC Private Entities, and the direct or indirect owner of First Capital Borrower and the First Capital Guarantors. FAC ¶10[3]; Case Statement pp. 6-11. Singal has participated in the operation and management of the affairs of the Enterprise through a pattern of racketeering, including acts of wire fraud and mail fraud. [Case Statement p. 4] Singal was critical to the racketeering scheme and he "agreed to, conspired in, and took unlawful steps with the knowledge that they were in furtherance of that pattern of racketeering activity." *Id.* "He enabled, conducted, maintained, aided, abetted, and profited from the racketeering scheme." [Case Statement p. 6] Singal orchestrated the diversion of First Capital REIT assets to the detriment of First Capital REIT, First Capital Operating Partnership and Plaintiffs. FAC ¶12 Singal directed, with the assistance of his co-defendants, the improper transfer of funds from defendant Tilden to the Forum Defendants and a number of other third parties totaling over $4 million. [Predicate Acts #9, 14-28]

Singal orchestrated the diversion of First Capital REIT cash and assets and the affiliations with the Forum Defendants and Presidential Defendants in furtherance of defendants' artifice. He schemed to obtain funds from the Forum Defendants in two tranches – first $15 million and later $2.5 million – which, on information and belief, First Capital REIT received by wire. These funds allowed First Capital REIT to finance the purchase of Frydman's remaining interests in First Capital Advisor, the Property Manager and the Operating Partnership. FAC ¶¶26(j) and (k), 75, 76, 78-81.

[3] Unless otherwise stated, references to a paragraph ("¶") refer to those paragraphs in the First Amended Complaint ("FAC").

Even though Tilden was not the obligor on these loans, Singal, in cooperation with his co-defendants, caused $3.5 million to be paid from Tilden to the Forum Defendants in exchange for no consideration to Tilden, again by wire. FAC ¶¶162(b), (j); [Case Statement p. 9; Predicate Act #14]

Between October 31, 2016 and November 28, 2016, acting through the FC Defendants and in collusion with the Forum Defendants, Singal made or caused to be made numerous additional improper transfers by wire from Tilden to FCREI and other third parties. FAC ¶¶84, 162(b); [Predicate Acts #15-28] Plaintiffs allege that a portion of these funds were wrongfully used to satisfy payroll obligations of First Capital Advisor, in violation of organizational documents. [Case Statement p. 9] The Case Statement includes numerous details regarding these predicate acts, such as the dates, parties involved, contact information and wire transfer numbers when available. [Case Statement pp. 31-41] This is more than the applicable pleading standard requires for predicate acts in furtherance of the fraudulent scheme. *In re Sumitomo Copper Litig.*, 995 F. Supp. at 456 ("Rule 9(b) does not require that the temporal or geographic particulars of each mailing or wire transmission made in furtherance of the fraudulent scheme to be stated with particularity.").

In Spring 2016, Singal falsely represented to Frydman in emails and during telephone conversations that the $17 million that First Capital REIT had raised through a public offering of common stock between September 20, 2015 and February 28, 2016 was used for "appropriate REIT purposes." FAC ¶162(i); [Case Statement p. 9; Predicate Act #7] In reality, these funds were "wrongfully used to bail-out other First Capital real estate projects, and divert the First Capital REIT funds to the Forum Defendants." *Id.*

Singal further designed the Sale to the Presidential Defendants in which substantially all of First Capital REIT's remaining assets were siphoned to Presidential REIT in exchange for grossly inadequate consideration, namely, nearly worthless units in Presidential OP. FAC ¶¶101-103, 109-111] Singal also oversaw the transfer of $800,000 from First Capital REIT to Presidential REIT in connection with the Definitive Agreement outlining the Sale. FAC ¶¶21, 28, 113. The Derivative Plaintiffs have, at the very least, set forth "the specific circumstances constituting the overall fraudulent scheme." *In re Sumitomo Copper Litig.*, 995 F. Supp. at 456.

b. The Independent Directors

The Independent Directors, Vande Steeg, McCook, Grant and Leider, each authorized two or more predicate acts and/or caused them to be committed. They participated in the diversion of First Capital REIT assets, including, at various times, by authorizing the wire transfers to First Capital REIT from the Forum Defendants, from Tilden to the Forum Defendants, FCREI and other third parties. [Predicate Acts #9, 14-23, 28]

Defendants Vande Steeg and McCook are former independent directors of First Capital REIT, who served until November 7, 2016 – the day this Action was filed. FAC ¶¶37, 38. Defendants Grant and Leider were appointed as independent directors of First Capital REIT on November 11, 2016. FAC ¶¶39, 40. Defendants Vande Steeg and McCook "have steadfastly continued to conceal the true financial condition of First Capital REIT." [Case Statement p. 17] Each knew of and authorized the fraudulent representations made by Singal to Frydman in Spring 2016 by mail and wire regarding the improper use of the $17 million in funds raised through First Capital REIT's public offering. [Predicate Act #7] *See Breslin*, 397 F. Supp. 2d at 399 ("The fact that a third party may have caused the use of the mails [or wires] does not render the pleading defective, so long as 'the defendants could reasonably have foreseen that the third-party would use the mails in the ordinary course of business as a result of defendants' acts.'").

The FAC asserts that "the FC Defendants, and in particular Singal, Vande Steeg and McCook have affirmatively sought to deny and conceal from Plaintiffs information about the missing funds." FAC ¶26(c).

Vande Steeg and McCook also authorized the transfer by wire of $2.5 million from defendant Forum and/or one of its affiliates, to one or more of the First Capital entities. [Predicate Act #9] They then authorized the wire transfer of nearly $3.5 million from defendant Tilden, even though Tilden was not obligated to pay this sum to the Forum Defendants. [Predicate Act #14] Finally, Vande Steeg and McCook participated in the transfer by wire of over $250,000 in additional funds from Tilden to various third parties. [Predicate Acts #15-23; Case Statement pp. 16-17]

Since their appointment, defendants Grant and Leider "have been participating in the direct dissipation of assets and the direct dissipation of assets via the Presidential REIT sale." FAC ¶159. They have allowed "the continued dissipation of assets of First Capital REIT, including but not limited to, all transfers wired since that time from Tilden's account, participation in the Presidential REIT sale; and further dissipation of real property through the sales of Tilden's property and the Fox Property." [Case Statement p. 18; Predicate Act #28]

For example, "with knowledge of the wrongful conduct alleged in the November 7, 2016 original complaint," Grant and Leider authorized a November 28, 2016 wire transfer of $46,000 from Tilden to ADP, which again was wrongly used to fund FCREI payroll obligations. [Case Statement p. 18; Predicate Act #28] Grant and Leider further authorized the payment of $800,000 from First Capital REIT to Presidential REIT in connection with the Sale, which presumably occurred by wire. FAC ¶¶21, 28, 113.

The Independent Directors argue that they are not liable for the above predicate acts simply by virtue of their board service, citing *Nat'l Group for Commc'ns and Computers, Ltd. v. Lucent Techs., Inc.*, 2004 U.S. Dist. LEXIS 25265, at *10 (S.D.N.Y. Dec. 15, 2004) (cited by the Presidential-FC Defendants at p. 40). Tellingly, however, defendants omit the *very next sentence* from *Lucent*, which makes clear: "Offices are directors are, however, personally liable for all torts which they authorize, direct or participate in, notwithstanding that they acted as agents of the corporation and not on their own behalf." *Id.*

As specified in the Case Statement, Vande Steeg, McCook, Grant and Leider each "directly participated in the Enterprise's Fraudulent Scheme with respect to the sale or transfer of assets from First Capital REIT . . . [and] have affirmatively conducted and participated in the conduct of the affairs of the Enterprise." [Case Statement pp. 16-18] Even more specifically, that participation includes allegations that Vande Steeg and McCook "steadfastly continued to conceal the true financial condition of First Capital REIT," and Grant and Leider "allowed continued dissipation of assets from First Capital REIT." *Id.* at p. 17. These allegations, coupled with the facts offered in the FAC regarding the improper siphoning of First Capital assets, provide the requisite detail regarding the Independent Directors' participation in the Enterprise and commission of two or more predicate acts. *See Breslin*, 397 F. Supp. 2d at 399.

c. FCREI and First Capital Advisor

Along with First Capital Borrower, discussed below, First Capital Advisor, FCREI and First Capital Advisor are the primary corporate vehicles through which Singal and his co-defendants have perpetrated the fraudulent scheme. FAC ¶¶17, 45, 46, 74, 115, 130. FCREI is the private holding company for First Capital Advisor and the entity through which Singal indirectly owns and/or controls First Capital Advisor and its affiliates. FAC ¶46. First Capital Advisor in turn controls First Capital REIT through its role as external advisor. FAC ¶¶17, 45.

It "conducts First Capital Operations and manages (directly, or through its management company affiliates) the property portfolio of First Capital REIT and all of its assets." [¶45] Under the direction of Singal and the Independent Directors, "First Capital Advisor (not First Capital REIT itself) employs all of First Capital REIT's management team, and makes all decisions for First Capital REIT, is in control of all First Capital REIT's properties and assets, is solely authorized to act on behalf of First Capital REIT, and is compensated by payment of a laundry list of fees from which it pays its employees and handsomely compensates its equity owners." FAC ¶49.

FCREI received $15 million from an affiliate of Forum, presumably by wire, which was used to partially finance the purchase of Frydman's remaining interests in First Capital Advisor, the Property Manager and First Capital Operating Partnership. FAC ¶74. FCREI also received two additional wire transfers from Tilden, which totaled more than $140,000. FAC ¶74; [Predicate Acts #21, 27] Moreover, compounding its role in the improper dissipation of assets from First Capital REIT and is subsidiaries, defendants arranged for First Capital Advisor's payroll obligations to be paid by wire from Tilden to ADP on First Capital Advisor's behalf, in violation of organizational documents. [Case Statement p. 9, Predicate Acts #24, 28]

d. First Capital Borrower

Defendants formed First Capital Borrower as the entity to be obligated on the Note pursuant to the Settlement Agreement. [¶¶6, 56] Singal is the direct or indirect majority owner of First Capital Borrower. [¶10] "[T]hrough the use of knowingly false and misleading mail and wire communications, First Capital Borrower has also engaged in the Fraudulent Scheme by transferring and diverting to various third-party entities monies and other assets that belonged to First Capital REIT." [Case Statement p. 16]

The sale of First Capital REIT to the Presidential Defendants will "strip First Capital REIT and First Capital Borrower and Guarantors of valuable assets, revenue, and income streams, leaving them incapable of paying the $16,259,556.67 obligation under the Note and the Guarantees." FAC ¶115. "Without payments from First Capital REIT, First Capital Borrower and the Guarantors will have no source of revenue or income, and no ability to pay the debt owed to Plaintiffs." FAC ¶¶115, 130.

The Case Statement states that "the Note was delivered with the knowledge and with intention of undermining and interfering with the monetary obligations thereof." [Case Statement p. 16] And as to First Capital Borrower, it specifies that, "through the use of knowingly false and misleading mail and wire communications, First Capital Borrower has also engaged in the fraudulent scheme by transferring and diverting to various third-party entities monies and other assets that belonged to First Capital REIT." *Id.* [Predicate Acts #15-28] First Capital Borrower "enabled, conducted, maintained, aided, abetted, and profited from the racketeering scheme." *Id.* Again, the Derivative Plaintiffs' description here provides the details required by Rule 8 for predicate acts in furtherance of the overall fraudulent scheme.

e. Tilden

Defendant Tilden is a limited liability company and is owned through a holding company by First Capital Operating Partnership. FAC ¶¶48, 50, 77. Tilden owns real property in Brooklyn, New York, which generates monthly income for First Capital REIT. FAC ¶48. The RICO Defendants improperly diverted the assets of Tilden to further the goals of the Enterprise. As detailed in the FAC and Case Statement, defendants caused Tilden to wire substantial funds to Forum, FCREI and various other third parties. The details regarding these wire transfers are set forth in the RICO Case Statement, which amount to over $4 million in funds wrongfully diverted from this subsidiary of First Capital REIT. [Predicate Acts #14-28]

For example, defendants caused Tilden to wire nearly $3.5 million to Forum on September 16, 2016, which was wrongful because Tilden "had no obligation to make said payment." FAC ¶¶76, 78, 79, 162(j); [Predicate Act #14] In addition, between October 31, 2016 and November 28, 2016, defendants caused Tilden to wire over $500,000 in fourteen separate transactions to various third parties, including over $140,000 to defendant FCREI. FAC ¶84, 162(b); [Predicate Acts #15-28]

2. The Forum Defendants

To further the pattern of racketeering, Singal colluded with the Forum Defendants, his affiliated partners and private lenders, "to liquidate and/or fraudulently transfer all of the valuable assets of First Capital REIT and its subsidiaries." FAC ¶12. As disclosed during a press conference on July 26, 2016, on June 9, 2016 First Capital REIT "closed a transaction with Defendant Forum, its 'institutional sponsor partner,' and brought on their senior management team to work with him and the rest of the First Capital senior management team in advising and operating First Capital Advisor." FAC ¶17. Singal further admitted that he would work with the Forum Defendants' senior management team, including defendant Platt, "to manage and operate the combined entity under the "Presidential" brand going forward." *Id.* The agreement with Forum provided that Forum would "provide strategic advice to FCREI, including with respect to product development, capital raising and operational efficiency." FAC ¶74.

Defendant Platt is the CEO and Managing Director of Forum. FAC ¶35. Defendant Marble is a Luxembourg partnership and an affiliated company of Forum. FAC ¶36. The Forum Defendants, and in particular Platt, have arranged to obtain control over FCREI through a pledge and collateral assignment of its assets and those of Singal and First Capital Advisor. FAC ¶46.

The FAC specifies that the Forum Defendants, primarily through Platt, first transferred $15 million to First Capital REIT "in exchange for a secret commitment to transfer numerous of the assets of First Capital REIT, free and clear of liability to Plaintiffs, to a new entity controlled by Singal and the Forum Defendants." FAC ¶26(j), 74, 75; [Case Statement pp. 7-8] Forum received 170,590.36 limited partnership units in First Capital Operating Partnership and the option to receive a 20% interest in First Capital Advisor and the Property Manager. FAC ¶74. Moreover, "the vast majority of the ownership interests in First Capital Advisor, upon information and belief, have been pledged to the Forum Defendants as collateral security for the loan." [Case Statement p. 19]

The Forum Defendants then transferred an additional $2.5 million to First Capital REIT by wire. FAC ¶26(k), 76; [Predicate Act #9] On September 16, 2016, the Forum Defendants, in coordination with the FC Defendants, caused Tilden, a subsidiary of First Capital REIT, to wire $3,464,500 to the Forum Defendants' bank account at Wells Fargo Bank. FAC ¶162(j); [Case Statement pp. 9, 19; Predicate Act #14] Significantly, Tilden wired this sum to the Forum Defendants "despite Tilden having no obligation on that debt, effectively wasting and misappropriating the assets of Tilden for the Forum Defendants' benefit at the unjustifiable expense of Tilden, First Capital REIT, and by extension, its shareholders, including Plaintiffs." FAC ¶26(k). Further, First Capital REIT likewise "owed no obligations under the $2.5 million loan" and none of the First Capital entities "are in privity with any of the Forum Defendants under any loan agreements." FAC ¶79. The Forum Defendants knew or should have known that Tilden was not an obligor of any sums due to the Forum Defendants or any of their affiliates. FAC ¶80. Nonetheless, "the Forum Defendants accepted repayment of the $2.5 million loan from Tilden, and thereby colluded and participated with the FC Defendants in a joint and ongoing scheme to pillage as much of First Capital REIT's assets as possible." *Id.*

Through these transactions, the Forum Defendants have taken control of the FC Defendants and their affiliates by embedding their own senior management personnel in the highest echelons of management of the FC Defendants. FAC ¶82. Indeed, during a meeting at

Frydman's home in New York, Platt indicated to Frydman that the Forum Defendants made the $15 million loan for the purpose of acquiring control of First Capital REIT and the affiliated First Capital entities. FAC ¶119. Through Forum and Marble, "Platt has taken actions, and directed other members of the Enterprise to take actions, necessary to accomplish the overall criminal aims of the Enterprise." [¶157]

3. The Presidential Defendants

Likewise, the FAC and Case Statement specify how Presidential REIT and Presidential OP will facilitate the sale of First Capital REIT's remaining assets. Presidential REIT was the pre-existing entity, whereas Presidential OP was formed to facilitate the sale. FAC ¶43. Presidential REIT is a Real Estate Investment Trust that currently owns a single property in Massachusetts. FAC ¶42; [Case Statement p. 24] And Presidential OP is a partnership formed to facilitate the fraudulent purchase of First Capital REIT to Plaintiffs' and the Derivative Plaintiffs' detriment. FAC ¶43 Presidential REIT is "broke" and "does not even have sufficient cash on hand to undertake a reasonable due diligence investigation of the true value of the assets of First Capital REIT." FAC ¶129. Moreover, "Presidential REIT and Presidential OP are knowingly participating in the RICO scheme and fraudulent conveyance of assets belonging to First Capital REIT in exchange for valueless interests in Presidential OP and/or Presidential REIT, for the purpose of divesting First Capital REIT of valuable assets for the benefit of the Enterprise." FAC ¶158.

In connection with the Sale, First Capital REIT is acting as the receptacle for the assets busted out of First Capital REIT. [Case Statement pp. 28-29] Presidential is the transferee of "assets purportedly valued at over $37 million," which, according to First Capital REIT, constitutes "substantially all of its assets, and those of its subsidiaries." FAC ¶¶104, 109, 110. This transaction – which has been confirmed by a material definitive agreement effective

December 16, 2016 – is a sham designed to avoid the FC Defendants' obligations to Plaintiffs under the Master Agreement and Settlement Agreement. [FAC ¶109] The Sale was orchestrated through the use of the mails and wires. Without the benefit of discovery, the exact nature of the use of the mails and wires by the Presidential Defendants is "within the peculiar knowledge of the defendants" and the Derivative Plaintiffs "cannot be required to identify all of the dates and particulars of the alleged [wires] and communications" without the benefit of discovery. *Celpaco*, 686 F. Supp. at 991.

"Through the mail and wires, Presidential REIT made false representations about the transaction." [Case Statement p. 29] Specifically, the FC Defendants concealed the pivotal fact that the purported "consideration" for the transaction – partnership units in Presidential OP – is nearly worthless as Presidential REIT is an "insolvent shell company . . . trading at 3 cents per share." [FAC ¶112] Thus, "the net effect of the sale will be to strip First Capital REIT and the First Capital Borrower and Guarantors of valuable assets, revenues, and income streams," while also "leaving them incapable of paying the $16,259,556.67 obligation under the Note and the Guarantees." [¶115]

Presidential REIT and its principals will benefit greatly from this sale because it constitutes a capital event of over $20 million, allowing the Presidential Defendants to "(i) collect deferred compensation of several hundred million dollars, (ii) collect substantial deferred bonuses, (iii) exercise, upon information and belief, 1,700 warrants, to acquire 1,700,000 shares of Presidential REIT at $00.10 per share, when the manifested value of each such share is $16.03 after the combination, and (iv) collect a 'profit' of $27 million at the cost of the current First Capital REIT shareholders, including Plaintiffs, who will be diluted dollar-for-dollar up to the same $27 million as a result thereof." [¶127] In addition, the transaction allows Presidential

REIT to acquire approximately $37 million in real estate assets for no consideration. [¶129] Finally, "the sale allows diversion of fees paid to the First Capital entities to a new advisory entity, controlled by Presidential REIT." [¶130]

The Presidential Defendants "are knowingly participating in the RICO scheme and fraudulent conveyance of assets belonging to First Capital REIT in exchange for valueless interests in Presidential OP and/or Presidential REIT, for the purpose of divesting First Capital REIT of valuable assets for the benefit of the Enterprise." [Case Statement at p. 44] Specifically, the FC Defendants and the Forum Defendants utilized Presidential REIT and OP to serve as receptacles for the assets fraudulently busted out from First Capital REIT. [Case Statement pp. 28-29] That bust-out, alleged as the Sale, was orchestrated through the use of the mails and wires in violation of 18 U.S.C. §§ 1341 and 1343. *Id.* at pp. 30-31. While the precise role of each Defendant and the number of predicate acts of wire fraud and mail fraud each committed in furtherance of the scheme are known only to Defendants, Plaintiffs are aware that, in connection with the Definitive Agreement, First Capital REIT transferred $800,000 to Presidential REIT, presumably by wire, "for operating capital and to pay expenses." *Id.* at p. 26; ¶113. Moreover, in connection with the orchestration of the sale – which presumably included multiple telephone conversations and/or email communications – on July 18, 2016, Presidential REIT executed a letter of intent with First Capital REIT that paved the way for the Sale. [Case Statement p. 25]

In sum, each of the RICO Defendants either directly or indirectly committed the predicate acts discussed respectively above. Each defendant could and should have reasonably foreseen that Singal and other participants would use the wires and mails in furtherance of the scheme to deprive First Capital REIT of value and in connection with Presidential Defendants' agreement to serve as the receptacle for First Capital REIT's assets. [*See* ¶163 ("Each participant knew, expected, reasonably foresaw and intended that these communications by mail and wire in interstate and foreign commerce would be used in furtherance of the racketeering scheme, and such use was an essential part of the scheme.")] *See also Breslin*, 397 F. Supp. 2d at 393.

The Derivative Plaintiffs therefore submit that this level of specification is sufficient to state viable RICO claims at the pleading stage. The Derivative Plaintiffs respectfully ask, however, that the Court grant it leave to amend its RICO counts if necessary to cure any technical pleading defects or to supplement their factual allegations with facts discovered through their investigation since the filing of the FAC and Amended RICO Case Statement. *See, e.g.*, *Elsevier*, 692 F. Supp. 2d 297 ("Because this pleading defect could be cured by amendment, I dismiss the RICO claim on this ground without prejudice and with leave to amend.").

III. The Derivative Plaintiffs Have Standing to assert their concrete RICO injuries

A. Legal Standard for Compensable RICO Injury

"RICO is to be read broadly." *Sedima v. Imrex Co.*, 473 U.S. 479, 497 (1985). The RICO statute created a private right of action by "[any] person injured in his business or property by reason of a violation of § 1962." *Id.* at 495. "If the defendant engages in a pattern of racketeering activity in a manner forbidden by these provisions, and the racketeering activities injure the plaintiff in his business or property, the plaintiff has a claim under § 1962(c)." *Id.* (no separate "racketeering injury" is required). "[A] cause of action does not accrue under RICO until the amount of damages becomes clear and definite." *City of New York v. FedEx Ground Packages Sys.,* 175 F. Supp. 3d 351, 369 (quoting *Motorola Credit Corp v. Uzan*, 322 F.3d 130, 135 (2d Cir. 2003)).

B. The Derivative Plaintiffs' RICO Injury is "Clear and Definite"

As specified in Sections 3, 4, and 12 of the Case Statement, the Derivative Plaintiffs have suffered and continue to suffer concrete injuries by reason of the RICO Defendants' operation of the Enterprise through acts of racketeering. In particular, from early 2016 through the present, the RICO Defendants have systematically and improperly siphoned valuable assets away from the Derivative Plaintiffs. These fraudulent transfers were made without adequate consideration to injure First Capital REIT and its shareholders, First Capital Operating Partnership and its limited partners, and the Plaintiffs in their business or property.

For example, on September 16, 2016, the RICO Defendants caused defendant Tilden to transfer $3,464,500 million by wire to the Forum Defendants for no consideration. [FAC ¶¶24(k), 162(j), Predicate Act #14] This transfer was fraudulent because Tilden was not the obligor on this purported "loan" from the Forum Defendants. [¶¶76, 78-81] Similarly, the RICO Defendants caused Tilden to undertake no fewer than 14 additional wire transfers to various parties between October 31, 2016 and November 28, 2016, totaling over $515,000, again without adequate, if any, consideration. [¶¶84, 162(b), Predicate Acts #14-28] As "Tilden is owned through a holding company by First Capital Operating Partnership, which in turn is owned by First Capital REIT," these transfers caused the value of First Capital REIT and First Capital Operating Partnership to be damaged in the amount of nearly $4 million. [¶77; Predicate Acts #9, 14-28]

Further, the RICO Defendants caused First Capital REIT to sell two valuable properties – Fox Rehabilitation Center and 2520 Tilden Avenue – for a combined price of $43 million, then unlawfully diverted these proceeds, by using the mails or wires, from First Capital REIT to their benefit and the benefit of their co-conspirators. [¶¶13, 14, 102, 103]

Also as part of their pattern, the RICO Defendants improperly disposed of over $17 million in funds raised through a public offering of common stock of First Capital REIT. [¶26(c), 70-73; Predicate Act #7] During telephone calls in Spring 2016, defendant Singal falsely represented that these funds were used for "appropriate REIT purposes." [Predicate Act #7] The Derivative Plaintiffs are informed and believe, however, that these funds were "converted, dissipated and/or wasted by the FC Defendants in connection with the Fraudulent Scheme." [¶73] Plainly, the improper transfer of these funds through the use of the mail and/or wires damaged the Derivative Plaintiffs by reducing the value of First Capital REIT and First Capital Operating Partnership.

In addition, as announced on December 16, 2016, the RICO Defendants, primarily through defendant Singal and the Independent Directors, agreed to transfer additional First Capital REIT assets valued at over $37 million to the Presidential Defendants, including newly-formed Presidential OP. [¶103] This transfer entails Presidential REIT's transfer of "substantially all of its assets, and those of its subsidiaries" to the Presidential Defendants, purportedly in exchange for Class B shares of limited voting stock in Presidential REIT, "an insolvent shell company whose stock has been hovering in value at around a dime a share." [¶¶103, 104] As detailed in the FAC, these assets include: "(i) 66% of its 92% ownership interests in Township Nine Owner LLC, which indirectly owns the fee simple interest in 23 parcels of land located in Sacramento, California (collectively, the "T9 Properties") and (ii) all of its 31.3% interest in Avalon Jubilee LLC, the owner of 251, non-contiguous single-family, residential lots and a 10,000 square foot clubhouse within the Jubilee at Los Lunas subdivision (the "Avalon Property"). [¶110]

Finally, using the mail and wires, and in collusion with the First Capital Defendants and the Forum Defendants, the Presidential Defendants have falsely represented the true nature of this sham transaction, including the lack of value received by First Capital REIT in connection with the transaction. [¶¶114, 118, ¶162(a); Case Statement at p. 29] In sum, *through these carefully sequenced diversions, dissipations and sham transactions, the RICO Defendants have fraudulently extracted over $100 million in assets from First Capital REIT for little or no consideration.*

The Derivative Plaintiffs' damages arising out of this systematic looting are "clear and definite." The amounts fraudulently siphoned away by the RICO Defendants from the Derivative Plaintiffs are readily computable – not "unknown," "speculative" or "unprovable," as defendants baselessly argue.

Moreover, the cases cited by defendants do not support their sweeping claim that RICO standing is somehow negated by the simultaneous pleading of other federal and state-law claims, or the mere possibility that additional fraud-based claims may be asserted by the Derivative Plaintiffs. [Presidential-FC Defendants MTD at p. 36] Of course, if such a bar did exist, no case alleging RICO violations and pendent state-law claims could ever survive a motion to dismiss.

As the law of RICO standing makes clear, the mere existence of simultaneous claims in an action – whether federal or pendent state-law claims – is not determinative. Instead, courts look to whether "contractual or other legal remedies remain which hold out a real possibility that the debt, and therefore the injury, may be eliminated or significantly reduced." *In re Merrill Lynch Ltd. P'ships Litig.*, 154 F.3d 56 (2d Cir. 1998). Here, there are no contractual rights available to the Derivative Plaintiffs, or other legal remedies which they may pursue, in lieu of this action to recover for the damages caused by the RICO Defendants' fraudulent scheme.

Each of the authorities defendants cite is readily distinguishable. For example, *DLJ Mortgage Capital, Inc. v. Kontogiannis*, 726 F. Supp. 2d 225 (E.D.N.Y. 2010) ("*DLJ*"), involved allegations by a mortgage institution that it was sold fake loans related to contrived real-estate sales and mortgage loan transactions. *Id.* at 228-32. The court in *DLJ* held that the plaintiff lacked standing because it had not yet attempted to foreclose on the loans in question, proceedings which could eliminate or at least reduce its alleged RICO damages. *Id.* at 238.

The Court noted that some of the properties backed by loans purchased by the plaintiff had not yet been resold, leaving a possibility the plaintiff could recover at least a portion of the $50 million in alleged damages through foreclosure proceedings. Indeed, the *DLJ* plaintiff had, in fact, instituted foreclosure proceedings against some of the straw buyers for the value of the promissory notes. *Id.* The Derivative Plaintiffs here are not similarly situated. They have no such contractual foreclosure rights. Instead, the Derivative Plaintiffs' injuries stem from the RICO Defendants' protracted and continuing diversion of First Capital REIT assets to defendants' personal gain.

Likewise, in *First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763 (2d Cir. 1994), the plaintiff bank lacked RICO standing because "several of the loans [at issue] in the amended complaint [had] not been sold, foreclosed, or restructured." *Id.* at 767. Accordingly, the bank's true losses were not yet known because a portion of its damages could be mitigated through foreclosure proceedings. *Id.* at 769. The *First Nationwide* court therefore correctly applied the rule: "[A] plaintiff who claims that a debt is uncollectible because of the defendant's conduct can only pursue the RICO treble damages remedy after his contractual rights to payment have been frustrated." *Id.* at 768. This rule does not apply here, however, because the Derivative Plaintiffs do not have similar contractual rights to enforce. *See also*, *Motorola Credit Corp. v.*

Uzan, 322 F.3d 130, 136 (2d Cir. 2003) (cited by the FC-Presidential Defendants at p. 35 and holding plaintiff lacked RICO standing due to its failure to first foreclose on the loans at issue).

The same holds true for Defendants' citation to *Goldfine v. Sichenzia*, 118 F. Supp. 2d 392 (S.D.N.Y. 2000) ("*Goldfine*"). In *Goldfine*, the court held the plaintiff lenders lacked RICO standing because they failed to first attempt to enforce their contractual rights under the allegedly fraudulent mortgages, and did not otherwise adequately "plead frustration of their contractual rights." *Id.* at 398. The court found plaintiff's "conclusory allegations that the notes, mortgages, and insurance policies underlying their loans are unenforceable, and that the debts are therefore uncollectible," were nothing more than "legal conclusions that must be reached by a court of competent jurisdiction before they will suffer any RICO injury." *Id.*; *see also*, *Hildene Capital Management LLC v. Friedman, Billings, Ramsey Group*, 2012 U.S. Dist. LEXIS 115942, at *43-45 (S.D.N.Y. Aug. 15, 2012) (cited by the FC-Presidential Defendants at p. 36 and holding plaintiff lacked RICO standing, in part, for failure to attempt to enforce its contractual rights under indentures).

Finally, defendants conflate the plaintiffs on behalf of whom the RICO claims have been asserted in this Action. Importantly, the two RICO counts are asserted derivatively and only on behalf of First Capital REIT and First Capital Operating Partnership – the "Derivative Plaintiffs" – not by JFURTI or Frydman individually. [*e.g.* ¶¶172-173] Defendants do not, and cannot, point to any contractual rights that are available to the Derivative Plaintiffs and offer the potential to reduce or eliminate their RICO damages. As the Court in *Allstate Ins. Co. v. Lyons* noted, cases in which a plaintiff is seeking redress for an uncollectible debt are "easily distinguishable" from actions grounded in fraud, even when a plaintiff could conceivably recover its fraud damages in a state-law action. 843 F. Supp. 2d 358, 374 (E.D.N.Y. 2012) (rejecting argument that Allstate's possibility of recovering money through state lawsuits for fraud rendered its damages speculative). Moreover, defendants have not identified any other state-law actions in which First Capital REIT or First Capital Operating Partnership is asserting claims in connection with the fraudulent activities detailed in the FAC. In sum, the Derivative Plaintiffs have no contractual rights to, and have commenced no pending suits seeking, redress for the clear and definite damages sought in the FAC and specified in the Amended RICO Case Statement. The Derivative Plaintiffs therefore have standing to assert their RICO claims.

C. Plaintiffs Can Bring Derivative Claims on Behalf of First Capital REIT and First Capital OP

Defendants argue that Plaintiffs lack standing to assert any claim on behalf of First Capital OP because they did not own any shares or OP units in First Capital OP "at the time this lawsuit was commenced." Singal MTD at p. 55[4]. However, the FAC alleges that Frydman "continues to be a shareholder of First Capital REIT, holding 47,680 shares of stock in First Capital REIT. Together, JRFUTI and Frydman own (directly and by collateral assignment) in excess of 25% of all the issued and outstanding shares of common stock of First Capital REIT." FAC ¶ 8. The FAC therefore clearly alleges that JRFUTI and Frydman are shareholders of First Capital REIT, which fully owns and controls First Capital OP (FAC ¶ 49), and therefore they have standing to bring this derivative action. *See Goldstein*, 142 F.2d at 425 ("[W]e think it clear that a stockholder can maintain a double derivative action in the federal courts.");[5/] *see also Pessin v. Chris-Craft Indus., Inc.*, 181 A.D.2d 66, 72 (App. Div. 1992) (stating that "the basis of a double derivative allegation is control");

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[4] Defendants continue to make this point about all the claims alleged in the FAC. Therefore, these standing arguments apply to all of Plaintiffs' claims as well.

[5] As a factual matter, Defendants are wrong that Plaintiffs do not own shares of First Capital OP. (Singal MTD at 56). According to the prospectus, every shareholder of the REIT has at least of one unit of The Operating Partnership for each share of stock in the REIT.

Indeed, the law is clear that First Capital REIT has double derivative standing to enforce claims brought by First Capital OP, its wholly owned subsidiary: "by its nature a double derivative suit is one brought by a shareholder of a parent corporation to enforce a claim belonging to a subsidiary that is either wholly owned or majority controlled." *Lambrecht v. O'Neal*, 3 A.3d 277, 282 (Del. 2010). "[T]he underlying basis for double derivative standing is the parent's ability to enforce the subsidiary's claim by the direct exercise of the parent's 100 percent control of the subsidiary." *Sagarra Inversiones, S.L. v. Cementos Portland Valderrivas, S.A.*, 34 A.3d 1074, 1080 (Del. 2011) (internal quotations omitted); *see also Klebanow v. New York Produce Exchange*, 344 F.2d 294, 297 n.2 (noting the "'double derivative' action by a stockholder of a corporation owning the stock of the injured corporation") (citing *Holmes v. Camp*, 180 App. Div. 409, 167 N.Y.S. 840 (1917); *Goldstein v. Groesbeck*, 142 F.2d 422, 425 (2nd Cir.), *cert. denied*, 323 U.S. 737 (1944); 2 Hornstein, Corporation Law and Practice § 712 at 193-94 & n. 13-14 (1959)).

D. Plaintiffs Are Adequate Representatives to Bring Derivative Claims

Defendants argue that Plaintiffs' are not adequate representatives with respect to their derivative action on behalf of First Capital RIET. However, this argument is premature and should not be decided on a motion to dismiss. *See Brickman v. Tyco Toys, Inc.*, 731 F. Supp. 101, 104 (S.D.N.Y. 1990) ("[T]he fact that plaintiff seeks to prosecute direct class and derivative actions simultaneously does not provide a basis for dismissal for failure to state a claim under Rule 12(b)(6)")). In addition, Defendants argue that "Plaintiffs' principal disqualification to serve as shareholder representatives arises from their assertion of both direct and derivative claims against First Capital REIT." (Singal MTD at p.30.) However, Plaintiffs no longer are pursuing in this action any direct claims against First Capital REIT (see *infra*). Consequently, this argument cannot be sustained. In addition, the essence of Plaintiffs' complaint clearly is a derivative claim on behalf of First Capital REIT and First Capital OP arising out of various harms to these two entities. The causes of action brought on behalf of these two entities are not the same as any direct claims brought in this action. Moreover, the relevant inquiry is whether a conflict exists because of the relief sought. Contrary to Defendants' allegations, there is no conflict here. The derivative claims that Plaintiffs are pursuing in this action do not involve a "competition with other shareholders for the same pool of money," because the direct claims that Plaintiffs will continue to pursue involve different causes of action and primarily seek declaratory or injunctive relief.

E. Plaintiffs In Fact Made a Demand, and Have Adequately Alleged Demand Futility In Any Event

Defendants assert that Plaintiffs "did not make a demand on the board of First Capital REIT either before they commenced this action or before they filed the FAC." Singal MTD at 27. Not only is that statement factually inaccurate, but it contradicts statements expressly set forth in the FAC. Plaintiffs did make demands on First Capital REIT, by way of their board of directors and the FC Defendants, in the form of "*numerous written demands* to the FC Defendants and First Capital REIT's board of directors for an accounting with respect to said $17 million." FAC ¶26(c). These demands went unanswered by the FC Defendants and the First Capital REIT's board of directors, and in fact "Singal, Vande Steeg and McCook have affirmatively sought to deny and conceal from Plaintiffs information about the missing funds." FAC ¶26(c). These allegations obviate the need for Plaintiffs to plead demand futility, as "the futility exception to the demand rule simply does not apply" where a demand has been made. *Bennett v. Damascus Cmty. Bank*, 2006 MDBT 6, *6-7 (Md. Cir. Ct. 2006) (pre-suit letter from counsel to the Board of Directors of the Bank constituted a demand, making "the futility exemption to the demand rule … legally irrelevant"). To the extent that Defendants contest the content or validity of those demands, that is a question of fact not properly decided on a motion to dismiss.

Even assuming, *arguendo*, that Plaintiffs' numerous written demands to the FC Defendants and First Capital REIT's board of directors were insufficient for purposes of alleging demand on First Capital REIT, these repeated unanswered demands for an accounting of a highly suspicious transaction, in and of themselves, further substantiate why additional demands on First Capital REIT would be futile. These records to which Plaintiffs were denied access were likely Plaintiffs' only avenue to "uncover particularized facts that would establish demand excusal" for purposes of the derivative suit. *Paul v. China MediaExpress Holdings, Inc.*, 2012 Del. Ch. LEXIS 3, *16 (Del. Ch. Jan. 5, 2012). That Defendants have sought to withhold any and all pertinent information from Plaintiffs, then charged them with failing to adequately present information before this Court that is in their exclusive custody and control, is at best disingenuous. These facts coupled with Plaintiffs' additional allegations that "[a]ll or a majority of such board members are interested in the foregoing transactions" and "[t]he transactions advance Singal's and the other FC Defendants' own self-interest because they are on all sides of the transaction," are sufficient for pleading demand futility, an exception to the demand requirement still recognized by the Maryland Court of Appeals. *See Boland v. Boland*, 423 Md. 296, n. 25 ("This Court has yet to close the door on the "futility" exception to demand requirement"); FAC ¶¶145, 147.

IV. The RICO Defendants are liable for their participation in a RICO enterprise

A. Legal Standard for "Association-in-Fact" RICO Enterprise

A RICO "enterprise" consists of "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1964(4). "An association of individuals can be an enterprise if it is formed for the purpose of engaging in any type of illicit activity . . . and it need not have any existence apart from the predicate acts committed by its employees and/or associates." *Elsevier Inc. v. W.H.P.R., Inc.*, 692 F. Supp. 2d 297, 305 (S.D.N.Y. Feb. 19, 2010) (more than "parallel conduct required"). "Members of the group need not have fixed roles; different members may perform different roles at different times." *Id.* at 306. "The high Court emphasized the 'breadth' of the concept of an "enterprise under RICO, and rejected the dissenters' argument that Congress intended RICO to apply only to business-like entities that have some existence apart from their illicit activity." *Id.*

An "association-in-fact" enterprise is "'a group of persons associated together for a common purpose by engaging in a course of conduct' which is 'proved by evidence of ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." *De Silva v. North-Shore-Long Island Jewish Health Sys., Inc.*, 770 F. Supp. 2d 497, 528 (E.D.N.Y. 2011) (quoting *U.S. v. Turkette*, 452 U.S. 576, 583 (1981)).

In analyzing whether a plaintiff has sufficiently pled an association-in-fact enterprise, courts "look to the 'hierarchy, organization, and activities' of the association to determine whether 'its members functioned as a unit.'" *First Capital Asset Mgmt. v. Satinwood*, 385 F.3d 159, 174-75 (2d Cir. 2004). An enterprise must have (1) a common purpose, (2) "relationships among those associated with the enterprise" and (3) enough longevity "to permit these associates to pursue the enterprise's purpose." *Boyle v. United States*, 556 U.S. 938, 946 (2009).

B. The RICO Defendants Formed an "Association-in-Fact" RICO Enterprise

Defendants pluck only a handful of paragraphs from the FAC to argue that it fails to offer any specific allegations regarding the structure of the enterprise or when its members joined. [FC-Presidential Defendants MTD at p. 48]; *See Norfolk County Ret. Sys. v. Ustian*, 2009 U.S.

Dist. LEXIS 65731, at *34 (N.D. Ill. July 28, 2009) ("[D]efendants cannot defeat a complaint by 'cherry picking; particular allegations that, standing alone, might not meet the heightened pleading standard under Rule 9(b)"). This argument fails once the FAC and Case Statement are viewed in their full and fair context.

1. The FC Defendants

The FAC and Case Statement detail the hierarchy, organization and activities of the Enterprise. Singal is the "mastermind and principal of, the association-in-fact [enterprise] that is also comprised of the other Defendants." [Case Statement p. 6] And Singal colluded with Platt, the Managing Director and CEO of Forum, to siphon the assets of First Capital to a new entity, Presidential, controlled by Platt and Singal. [Case Statement at p. 8] Through Singal and other Forum senior management, the Forum Defendants took control of First Capital REIT and the Presidential Defendants. *Id.* at pp. 8-9.

Singal also enlisted the Independent Directors – first Vande Steeg and McCook, and later Grant and Leider – to accomplish the enterprise's goal of siphoning First Capital REIT's cash, including from defendant Tilden, and then transferring First Capital REIT's remaining assets to the chosen receptacle, Presidential. [Case Statement pp. 17-18] Singal and the Independent Directors also further their fraudulent scheme through First Capital Advisor, which controls First Capital REIT through its role as external advisor. FAC ¶¶17, 45. First Capital Advisor in turn "conducts First Capital Operations and manages (directly, or through its management company affiliates) the property portfolio of First Capital REIT and all of its assets." FAC ¶45. And FCREI is the private holding company of First Capital Advisor, and the entity through which Singal owns and/or controls First Capital Advisor and its affiliates. FAC ¶46. Finally, through First Capital Borrower, Singal and his co-defendants defrauded Plaintiffs by arranging for it to be obligated on the Note, and then quickly depriving First Capital Borrower of available income streams which could have been used to satisfy their obligations to the Plaintiffs.

2. The Forum Defendants

The FAC and Case Statement also lay out the roles each of the Forum Defendants play in the pattern of racketeering. As Singal has disclosed, he will work with the Forum Defendants' senior management team, including Platt the CEO and Managing Partner of Forum and its affiliate Mable, to manage and operate the combined entity under the Presidential REIT brand going forward. FAC ¶17. Forum will "provide strategic advice to FCREI, including with respect to product development, capital raising and operational efficiency." *Id.* Through Platt, the Forum Defendants furthered the fraud primarily by funding First Capital REIT's purchase of Frydman's remaining interests in certain FC Defendant entities, in exchange for a secret commitment to assume control of First Capital REIT following the sale to Presidential. In addition, the Forum Defendants served as the transferee of $3.5 million in funds from defendant Tilden. [Predicate Act #14] In collusion with the FC Defendants, the Forum Defendants will acquiring control of First Capital REIT and the affiliated First Capital entities. FAC ¶119.

3. Presidential Defendants

Likewise, the FAC and Case Statement specify how Presidential REIT and Presidential OP will facilitate the sale of First Capital REIT's remaining assets. Presidential REIT was the pre-existing entity, whereas Presidential OP was formed to facilitate the sale. FAC ¶43. Presidential REIT has helped conceal the worthless nature of the consideration exchanged in the transaction. FAC ¶112; [Case Statement p. 29] Once the sale is consummated, they shall profit handsomely by reaping millions in deferred compensation and bonuses and units in the new combined entity. FAC ¶¶126-131.

These detailed allegations defeat the FC Defendants' hollow claim that Plaintiffs simply "str[i]ng together all of the defendants in this action and label[] the resulting group an association-in-fact enterprise." [FC Defendants' MTD at p. 49] Moreover, the case cited by defendants in ostensible support, *Nasik Breeding & Research Farm Ltd. v. Merck & Co.*, 165 F. Supp. 2d 514 (S.D.N.Y. Aug. 30, 2001), is inapplicable here. Rather than detailing the structure of the enterprise and the roles of each defendant, the plaintiff in *Nasik* offered nothing more than a statement that the 12 defendants "combined in an association-in-fact . . . in that its members share a common purpose, unity and identifiable structure." *Id.* at 539. The complaint was devoid of "specific details of any hierarchy, organization, or unity among the various alleged conspirators." *Id.*

The FAC and Case Statement go well beyond these conclusory labels and are more than sufficient at the pleading stage to overcome defendants' motions to dismiss. The RICO Defendants' coordinated activities go well beyond the mere "parallel conduct" discussed in *Elsevier*. Here, three subgroups of defendants banded together for a common purpose: "to systematically and continuously take control of First Capital REIT, then use First Capital REIT to divert monies to the personal purposes of the members of the Enterprise, causing harm to First capital REIT and all of its shareholders." [Case Statement p. 44] The Derivative Plaintiffs have set forth the dates each RICO Defendant joined in the pattern of racketeering, the manner in which the Forum Defendants and Presidential Defendants have colluded with Singal and the FC Defendants to accomplish the specific acts of racketeering, and the organization of the anticipated combined entity under the Presidential brand. Moreover, Plaintiffs have detailed each member's critical role in accomplishing these acts. As alleged, then, the RICO Defendants are not acting together by happenstance, but have coordinated to operate an ongoing enterprise to achieve their illicit goals. Accordingly, the allegations in the FAC and Case Statement sufficiently set forth an association-in-fact enterprise.

C. The Unlawful Activities of the Enterprise Are Distinct from the Individual Defendants' Own Affairs

The FC-Presidential Defendants note, in cursory fashion, that each RICO defendant "must conduct the enterprise's affairs, not just [its] own affairs." *Reves v. Ernst & Young*, 507 U.S. 170, 185 (1993) (cited by FC-Presidential Defendants at p. 50). Defendants fail to explain, however, how this settled principle of "distinctiveness" applies to their motion, or how they apparently believe the FAC and Case Statement are deficient in this regard. Plaintiffs do not dispute this requirement, and the FAC and Case Statement make clear that each RICO Defendant – a "person" for purposes of 1962(c) – is sufficiently distinct from the broader association-in-fact "enterprise." *Palatkevich v. Choupak*, 2014 U.S. Dist. LEXIS 10570, at *36-37 (S.D.N.Y. Jan. 24, 2014).

In *Palatkevich*, this Court adopted the distinctiveness reasoning in *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 161-64 (2001). *Kushner* noted that the distinctiveness inquiry "varies depending on whether the party named as the defendant 'person' is a corporate entity or a natural person." *Palatkevich* at *37. Under *Kushner*, "a natural person named as the defendant 'person' is inherently distinct from a corporate entity 'enterprise' for which he acts as an agent; in such a case the distinctiveness requirement is met." *Id.* at *42 (citing *Kushner*, 533 U.S. at 163). *Palatkevich* also applied the distinctiveness test for *corporate entity* RICO defendants from *Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.3d 339, 344 (2d Cir. 1994), and *Cruz v. FXDirectDealer, LLC*, 720 F.3d 115, 120 (2d Cir. 2013). These two opinions recognize that, "where a corporate entity is named as the defendant 'person,' it is not distinct from any alleged 'enterprise' consisting of that corporate defendant together with related companies, employees, or agents." *Palatkevich* at *44 (citing *Cruz*, 720 F.3d at 121 and *Riverwoods*, 30 F.3d at 344-45) ("[B]y alleging a RICO enterprise that consists merely of a corporate defendant associated with its own employees or agents carrying on the regular affairs of the defendant, the distinctness requirement may not be circumvented."). This is because related companies with common ownership and officers "are effectively a single entity." *Palatkevich*, 2014 U.S. Dist. LEXIS 10570, at *43-44. But as important, *Riverwoods* and *Cruz* make clear that distinctiveness *is* satisfied where, as here, a corporate entity and its officers and directors "associate[] with others to form an enterprise that is sufficiently distinct from itself." *Id.* (quoting *Riverwoods*, 30 F.3d at 344). Under this reasoning, "a corporate defendant 'person' may be one of several members of an association-in-fact 'enterprise,' so long as the enterprise is distinct from the corporation." *Palatkevich*, 2014 US. Dist. LEXIS 10570, at *37.

Plaintiffs have specified how three subgroups of defendants – the FC Defendants, the Forum Defendants and the Presidential Defendants – and the people controlling them associated to achieve the Enterprise's fraudulent goals. Under *Kushner*, the natural persons named as RICO Defendants – Singal, Platt, Steeg, McCook, Grant and Leider – are "inherently distinct." And under *Cruz/Riverwoods*, the corporate entity RICO Defendants – FCREI, First Capital Advisor, First Capital Borrower, Tilden, Forum, Marble, Presidential REIT and Presidential OP – are "sufficiently distinct" from the combined association-in-fact such that they are not "effectively a single entity." *See*, *e.g.*, *Allstate Inc. Co. v. Valley Physical Med. & Rehab., P.C.*, 2009 U.S. Dist. LEXIS 91291, at *18 (E.D.N.Y. Sept. 30, 2009) (holding association of various individuals and entities constituted two distinct entities: the person(s) and the enterprise). Under the guidance of *Palatkevich* and the cases on which it relied, the Derivative Plaintiffs have satisfied the distinctiveness requirement of Section 1962(c) for each of the RICO Defendants.

D. Each RICO Defendant Operated or Managed the RICO Enterprise

A person is liable under Section 1962(c) if he or she "conduct[ed] or "participate[d] . . . in the conduct of" the enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. § 1962(c). This standard, often referred to as the "operation or management test," requires each defendant to have had "some part in directing the enterprise's affairs":

> In order to "participate, directly or indirectly, in the conduct of such enterprise's affairs," one must have some part in directing those affairs. Of course, the word "participate" makes clear that RICO liability is not limited to those with primary responsibility for the enterprise's affairs, just as the phrase "directly or indirectly" makes clear that RICO liability is not limited to those with a formal position in the enterprise, but some part in directing the enterprise's affairs is required. [emphasis in original]

Reves, 507 U.S. at 179. The "operation or management" test is a "low hurdle" at the pleading stage. *Maersk, Inc. v. Neewra, Inc.*, 687 F. Supp. 2d 300, 335 (S.D.N.Y. 2009). "RICO liability is not limited to those with primary responsibility for the enterprise's affairs." *Id.* at 335 (quoting *U.S. v. Diaz*, 176 F.3d 52, 93 (2d Cir. 1999). Instead, a defendant "must have *some part* in directing [the enterprise's affairs." *Palatkevich*, 2014 U.S. Dist. LEXIS 10570, at *45 (emphasis added) (quoting *Reves*, 507 U.S. at 179).

The allegations in the FAC and Case Statement satisfy the *Reves* test as to each defendant. The Derivative Plaintiffs detail the part each defendant played in operating the Enterprise, as well as how three subgroups of defendants directed separate but coordinated aspects of the defrauding of First Capital REIT, First Capital Operating Partnership and the interest holders in these entities. Specific examples of each RICO Defendant's participation in the affairs of the Enterprise are summarized below.

1. FC Defendants

- Singal: Singal acted as the "mastermind" of the scheme and orchestrated the involvement of the Forum Defendants and the Presidential Defendants to achieve the goals of the

Enterprise, primarily the diversion of assets to a new entity where Singal, the Forum Defendants and the Presidential Defendants would reap handsome illicit rewards. [¶12; Case Statement p. 6] Singal "maintains command and control of the Enterprise on a strategic level, is the principal authority figure with final say on business decisions, and has taken actions and directed other members of the Enterprise to take actions that are necessary to accomplish the overall criminal aims of the Enterprise." [Case Statement p. 43]

- FCREI: FCREI is a "central figure" in the Enterprise and "is the entity through which Singal controls the other FC Defendants and through which Singal was able to carry out many of the aforementioned acts." *Id.* at pp. 11-12. FCREI acquired Plaintiffs' ownership interest in First Capital Advisor in connection with the Master Agreement. [Case Statement at p. 12] FCREI is also the entity through which Singal and Platt structured the $15 million loan from the Forum Defendants, presumably obtained by wire. *Id.*
- First Capital Advisor**:** First Capital Advisor controls and manages First Capital REIT as its external advisor. FAC ¶¶17, 45. Directly or through its management company it controls the property portfolio of First Capital REIT and all of its assets. FAC ¶45. It employs First Capital REIT's management team, and is solely authorized to act on behalf of First Capital REIT. FAC ¶49.
- First Capital Borrower: First Capital Borrower is the obligor on the Note to Plaintiffs. [¶¶6, 56] Defendants offered First Capital Borrower as an obligor on the Note to induce Plaintiffs to enter into the Settlement Agreement "with the knowledge and with intention

of undermining and interfering with the monetary obligations thereof." [Cast Statement p. 16]

- Tilden: Tilden was the primary entity through which funds were siphoned out of First Capital REIT. [Predicate Acts 14-28] This totaled over $4 million between September 16, 2016 and November 28, 2016. *Id.* Over $140,000 of this sum was wired directly to defendant FCREI. In addition, Tilden was the transferee of a $2.5 million loan from the Forum Defendants FAC ¶¶26(k), 76; [Predicate Act #9]
- Independent Directors Vande Steeg and McCook: Vande Steeg and McCook effected the fraudulent representations to Frydman regarding $17 million in funds raised by First Capital REIT, and they "affirmatively sought to deny and conceal from Plaintiffs information about the missing funds." FAC ¶26(c). They disregarded targeted demands from Plaintiffs regarding the use of the missing funds, concealed the Presidential transaction by failing to file required quarterly and annual statements and "explicitly approved the $16.03 per share NAV for First Capital REIT, without any adequate public disclosure to support this questionable increased valuation." [Case Statement p. 17]
- Independent Directors Grant and Leider: Grant and Leider also participated in the dissipation of First Capital REIT assets and in designing the sale to Presidential REIT. [¶159; Case Statement p. 18]

Ignoring this specification of participation, defendants argue that the Derivative Plaintiffs fail to show how the above FC Defendants operated or managed the Enterprise. [FC-Presidential MTD at pp. 50-52] As detailed in the FAC and Case Statement, however, each defendant had, at the very least, "some role" in directing the affairs of the Enterprise, albeit in varying degrees. *Reves*, 507 U.S. at 179.

2. The Forum Defendants

- Platt: Platt is the CEO and Managing Partner of Forum and Marble. FAC ¶35. He "is in command and control of the Forum Defendants." [Case Statement pp. 44] He controls FCREI through a pledge and collateral assignment of its assets and those of Singal and First Capital Advisor. FAC ¶46. Platt, through the Forum Defendants, transferred millions to the FC Defendants in exchange for a secret commitment to transfer the assets of First Capital REIT to a new entity, free and clear of liability to Plaintiffs. FAC ¶¶26(j), 74, 75; [Case Statement pp. 7-8] Singal disclosed that he will work with the Forum Defendants' senior management team to manage and operate the combined entity under the Presidential REIT brand. FAC ¶17.
- Forum and Marble: Form and Marble are affiliated entities through which Platt executed on the plan to take control of the new entity, Presidential, with Singal. [¶119] One or both of these entities made wire transfers of $2.5 million and $15 million to the FC Defendants, though the transferor is not yet known to Plaintiffs as it is in the peculiar knowledge of defendants. [¶¶74, 75; Predicate Act #9]

3. The Presidential Defendants

Presidential Realty is colluding with Singal, the FC Defendants and the Forum Defendants to hollow out the remainder of First Capital REIT's assets and place them beyond the reach of its creditors. [¶¶42, 43, 158] Presidential made false representations about the Sale to conceal the worthless nature of the "consideration" exchanged so that it wrongly could benefit in the form of deferred bonuses, warrants and the valuable assets it will acquire. [¶¶127, 130] Presidential OP was formed by Presidential to facilitate the purchase of assets from First Capital REIT. Both of these Presidential entities are active in operating the Enterprise through their roles in effecting the unlawful activities of Singal, Platt and the remaining FC and Forum Defendants.

The FC-Presidential Defendants argue, without support or citation to the FAC or Case Statement, that "the Presidential Defendants conducted their own affairs and that First Capital was on the other side of the bargaining table." [FC-Presidential Defendants MTD at p. 50] Plaintiffs' actually allege that the transaction to which defendants refer was a "sham." [¶22, Case Statement at pp. 26, 29] As opposed to a legitimate business transaction, "Presidential REIT and Presidential OP knowingly provided substantial assistance to First Capital REIT in consummating the sale by, among other things, agreeing to purchase the assets of First Capital REIT and its subsidiaries once they had shed their obligations to Plaintiffs, to advance its own interests." [Case Statement pp. 26-27] Presidential helped orchestrate the Sale, in part, because it stood to reap millions in deferred compensation and assets from First Capital REIT. *Id.* at 27.

Finally, defendants argue that the Presidential Defendants "could not possibly manage or direct the affairs of any First Capital entity because 'corporations can only act through their individual officers, directors or agents' (who are not explicitly identified)." [FC-Presidential Defendants MTD at p. 51] [citations omitted] But while entities necessarily act through their employees, officers, directors and agents, courts *have* found entities vicariously liable under 1962(c) for the acts of individuals affiliated with or working on behalf of the entities. *Cain v. Bethea*, 2007 U.S. Dist. LEXIS 75824 (E.D.N.Y. Aug. 17, 2007) (finding entity vicariously liable under 1962(c) where allegations show principals took part in directing affairs of enterprise) (citing *Bank of China v. NBM L.L.C.*, 2001 U.S. Dist. LEXIS 18040, at *2 (S.D.N.Y. Nov. 5, 2001) (indicating that business entities may be proper RICO defendants where "individual defendants are alleged to have controlled and managed the business entities")). To impose vicarious liability under this rule, the plaintiff must demonstrate sufficient involvement, such that "a corporate officer or director had knowledge of, or was recklessly indifferent toward, the unlawful activity." *Amendolare v. Schenkers Int'l Forwarders, Inc.*, 747 F. Supp. 162, 169 (E.D.N.Y. 1990).

The Derivative Plaintiffs have met this standard with respect to the Presidential Defendants (and the remaining entity-defendants named in Count I). Presidential' s principals surely knew of the Presidential Defendants' orchestration of the sale of First Capital REIT. They "stand to benefit considerably" from the sale as it constitutes a capital event of over $20 million. [¶127] Upon the sale's closing, they will receive million in the form of deferred compensation and bonuses and First Capital Opportunity to purchase 1,700,000 shares in First Capital REIT, entitling them to a "profit" of $27 million to the detriment of First Capital REIT's shareholders. [¶¶127-128] Additional details setting forth the principals' goals in participating in the RICO scheme, including in the direction of its affairs with respect to the sale, are set forth in paragraph 128-131 of the FAC.

E. Defendants' Ongoing Enterprise Poses a Threat of Continued Criminal Activity

The FAC and Case Statement sufficiently describe not only the requisite predicate acts, but also the ways in which these acts are related and pose a continuing threat of criminal activity – known as "continuity" in RICO jurisprudence. Courts look to a variety of factors in assessing "continuity" on a case-by-case basis, "such as the number and duration of acts, victims and/or participants." *Com-Tech Asscos. v. Computer Assocs. Int'l, Inc.*, 753 F. Supp. 1078, 1091 (E.D.N.Y. 1990).

Here, defendants' pattern of racketeering evidences "open-ended continuity" because "the predicate acts were a regular way of operating that business [and] … the nature of the predicate acts themselves implies a threat of continued criminal activity." *Cofacredit, S.A.* v. *Windsor Plumbing Supply Co*., 187 F.3d 229, 243 (2d Cir. 1999). Thus, even if this Court finds that a single "scheme" is set out in the FAC and Case Statement, that is sufficient to demonstrate continuity. *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 240-41 (1989) (multiple schemes not required) ("We adopt a less inflexible approach that seems to us to derive from a commonsense, everyday understanding of RICO's language and Congress' gloss on it. What a plaintiff or prosecutor must prove is continuity in racketeering activity, or its threat, simpliciter. This may be done in a variety of ways….").

Defendants have continually sought to divert the assets and income streams of First Capital REIT through "a joint and ongoing scheme," including by the pledge of assets as collateral in connection with the Note, the avoiding of obligations of First Capital REIT to creditors, and the profiting from the artificially inflated value of shares in First Capital REIT, all to create a windfall for each of the RICO Defendants. [*e.g.* ¶80] For all of these defendants, these predicate acts "were a regular way of conducting Defendants' ongoing business and of conducting or participating in the ongoing RICO Enterprise." [¶167] The FAC further states that the predicate acts "were a critical means of supporting Defendants' business and continue to form a pattern of racketeering activity." *Id.*

Moreover, defendants have shown an ongoing propensity for defrauding individuals and entities through their operation of supposedly legitimate REIT vehicles. First, Singal, through FCREI and First Capital Advisor, made numerous misrepresentations in the course of the purchase of First Capital REIT, and in the negotiation and (lack of) performance in connection with the Settlement Agreement and Note. [¶¶51-69] He then aligned with Platt and the Forum Defendants, and Presidential REIT and Presidential OP, to further defraud Plaintiffs through the devaluing of First Capital REIT, culminating in the sale of First Capital REIT's remaining assets to the Presidential Defendants. [¶¶74-121] Defendants have repeatedly shown they will take any illegal steps necessary to avoid these entities' obligations to legitimate creditors and conceal the fraudulent nature of their acts.

This pattern of ongoing conduct is manifested in various ways, including:

- Defendants' misrepresentations regarding the nature of assets contributed to First Capital Operating Partnership in connection with the Master Agreement;
- The breach of obligations to creditors in favor of defendants' personal interests, such as the diversion of income streams and assets out of First Capital REIT despite obligations to Plaintiffs under the Settlement Agreement and Note;
- The sham sale of substantially all of First Capital REIT's assets to the Presidential Defendants for vastly inadequate consideration;
- The misrepresentations regarding the dissipation of over $17 million in public funding raised by First Capital REIT;
- The systematic and intentional mismanagement of First Capital REIT, including the decision to conceal the nature of First Capital REIT's business by failing to file requisite quarterly and annual financial statements and defaulting on properties whose obligations are guaranteed by Frydman; and
- The manipulation of the NAV of shares in First Capital REIT and concealment of the true value through the Presidential transaction.

This recurring wrongdoing underscores how acts of wire fraud, mail fraud, misrepresentation and active concealment were – and continue to be – defendants' "regular way of doing business."

Further, even excluding acts arguably actionable as securities fraud, Plaintiffs have identified no less than sixteen instances of mail fraud and wire during 2016 alone. [Predicate Acts #7, 14-18] These acts have harmed numerous victims, including First Capital REIT and each of its shareholders, and First Capital Operating Partnership and each of its limited partners. This is not, as defendants' allege, a case involving "a single injury, and few victims." [FC-Presidential MTD at p. 45] The Derivative Plaintiffs and holders of interests in those companies were repeatedly harmed by defendants' fraudulent diversion of assets away from First Capital REIT through numerous wire transfers from defendant Tilden, as well as emails and phone calls in which Singal misrepresented that First Capital REIT had used the $17 million in public financing raised for appropriate REIT purposes.

And even now that defendants' pattern of racketeering has been exposed, there remains an imminent threat that their racketeering activities will continue as they seek to further conceal the disposition of the assets of First Capital REIT/Presidential and place those assets beyond the reach of creditors, including the Plaintiffs and Derivative Plaintiffs. *United States v. Gelb*, 881 F.2d 1155, 1163-64 (2d Cir. 1989) ("The requirement of continuity is satisfied; the schemes were conducted for about five years, and but for their discovery surely would have continued."). This is not, as defendants claim, a sequence of frauds which, by its nature, had to or would have come to an end. *Wells Fargo Century, Inc. v. Hanakis*, 2005 U.S. Dist. LEXIS 17440, at *19 (E.D.N.Y. June 28, 2005).

So-called "inherently terminable" schemes are distinguishable from the facts alleged in the FAC and Case Statement, which establish a threat of repetition. *First Interregional Advisors Corp. v. Wolff*, 956 F. Supp. 480, 486. *See Satinwood*, 385 F.3d at 181 (cited by defendants and noting no predicate acts committed in five preceding years "which suggests scheme had come to a close"). Indeed, on November 23, 2016, the RICO Defendants caused First Capital REIT to finalize prerequisite conditions to sell the Fox Rehabilitation Center for $12 million. [¶13] Less than one month later, on December 22, 2016, the RICO Defendants caused First Capital REIT to finalize prerequisite conditions to sell 2520 Tilden Avenue for $31 million. [¶14] As detailed in the Case Statement at pp. 40-41, "the use or dissipation of such proceeds remains undisclosed." [emphasis added] Given the RICO Defendants' prior conduct in diverting assets away from First Capital REIT and the imminent sale to Presidential, there is a substantial likelihood defendants will commit additional acts of wire fraud to improperly transfer these proceeds and/or mail fraud to conceal what will become of these substantial sales proceeds.

Defendants cite *Aliev v. Borukhov*, 2016 U.S. Dist. LEXIS 88856 (E.D.N.Y. July 8, 2016), in support of their argument that Plaintiffs allege an "inherently terminable" scheme. But, in *Aliev*, the plaintiff alleged one legitimate transaction followed by fraud in the sale of properties "spread out over four transactions, suggesting that they were not integral to the way the Borukhovs conducted business." *Id.* at *34-35. Here, Plaintiffs have identified at least sixteen predicate acts in furtherance of defendants' fraud, with significant aspects of that fraud – such as the fraudulent transfer of assets to Presidential and the further dissipation First Capital REIT cash and assets – still very much in progress. [Predicate Acts #7, 14-28]

While the FC Defendants, Forum Defendants and Presidential Defendants have reached a Definitive Agreement in connection with the sale of First Capital REIT to Presidential, the FAC points out that First Capital OP "will be transferring substantial assets to Presidential OP in exchange for units of limited partnership interests in same, convertible into shares of the valueless Presidential REIT Class B shares." [¶20] Specifically, during a public conference call on July 26, 2016, Singal represented that "We are still in determination of what the best plan for

Presidential going forward will be . . . And those specifics are being flushed out. As we have that determined, we will then divulge that to the marketplace." [¶106] Indeed, in or about May 2016, Platt personally informed Frydman "that he was in the process of acquiring control of First Capital REIT, or the real property assets under First Capital REIT's control, through a series of agreements with Singal and his affiliated entities." [¶120] These professed acts explicitly project into the future and thus imply an "ongoing threat of continued criminal activity" sufficient to satisfy the "open-ended continuity" definition.

F. The Derivative Plaintiffs' RICO Claims Are Not Barred by the PSLRA

Section 107 of the PSLRA – the RICO Amendment – precludes a plaintiff only from "rely[ing] upon *any conduct* that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962." 18 U.S.C. § 1964(c) (emphasis added). By necessity, the converse is also true: conduct that is *not* "actionable" as securities fraud may be alleged as the factual basis for predicate acts supporting a RICO claim. *See Kayne v. Ho*, 2012 U.S. Dist. LEXIS 192916, at *34-36 (C.D. Cal. Sep. 6, 2012) ("[T]he PSLRA does not bar reliance on all predicate acts pertaining to securities, only reliance on those acts that would have been actionable by some party."); *see also MLSMK Inv.*, 651 F.3d at 280 ("[T]he PSLRA's RICO Amendment, 18 U.S.C. § 1964(c), bars a plaintiff from asserting a civil RICO claim premised upon predicate acts of securities fraud.").

Properly read, Plaintiffs' RICO claims do not rely upon any conduct that is actionable as securities fraud. Actionable securities fraud requires a defendant to have, at a minimum: "(1) made a material misrepresentation or a material omission as to which he had a duty to speak, or used a fraudulent device; (2) with scienter; (3) in connection with the purchase or sale of securities." *SEC v. Boock*, No. 09 Civ. 8261, 2011 U.S. Dist. LEXIS 95363, 2011 WL 3792819, at *21 (S.D.N.Y. Aug. 25, 2011). The "in connection with" requirement is critical; conduct unrelated to the purchase or sale of securities cannot give rise to actionable securities fraud, and consequently, cannot support the application of the PSLRA bar. *See MLSMK*, 651 F.3d at 277 n.11 (noting the proposition that a court must ask "not whether a plaintiff can state a claim under a non-securities related predicate act, but whether the allegations that form the basis of [the non-securities-related] predicate act occur 'in connection with' securities fraud") (quoting *Sell v. Zions First Nat'l Bank*, No. CV-05-0684, 2006 WL 322469, at *10, 2006 U.S. Dist. LEXIS 6558, at *33-34 (D. Ariz. Feb. 9, 2006)); *Bald Eagle Area Sch. Dist. v. Keystone Fin.*, 189 F.3d 321, 329-30 (3d Cir. 1999) (asking whether the alleged conduct "undertaken to keep a securities fraud Ponzi scheme alive" was conduct "undertaken in connection with the purchase and sale of securities" such that the PSLRA bar applied).

To occur "in connection with" a purchase or sale of a security, the fraudulent misrepresentation or omission must be "material to a decision by one or more individuals (other than the fraudster) to buy or to sell a covered security." *Chadbourne & Parke LLP v. Troice*, 134 S. Ct. 1058, 1066 (2014) (internal quotation marks omitted). "Conduct that is incidental or tangentially related to the sale of securities will not meet this standard." *Ling v. Deutsche Bank, AG*, No. 04 CV 4566 (HB), 2005 U.S. Dist. LEXIS 9998, at *13-14 (S.D.N.Y. May 26, 2005).

None of the predicate acts of wire fraud or mail fraud discussed in detail in section IV(B) gives rise to actionable securities fraud. Singal's misrepresentations by wire and telephone to Frydman regarding the disposition of First Capital REIT's $17 million in public funding were not made "in connection with" a purchase or sale of a security. [Predicate Act #7] No party relied on these fraudulent statements in buying or selling a security.

Likewise, the wire transfers identified as Predicate Acts #14-28 were not made "in connection with the purchase and sale of securities" to trigger the PSLRA bar. Indeed, finding that the bust-out of First Capital REIT's assets through these wire transfers occurred "in connection with" the purchase or sale of a security would reach beyond the limits the Supreme Court has imposed on what gives rise to actionable securities fraud. *Cf. SEC v. Zandford,* 535 U.S. 813, 825 n.4, (2002) (describing an example of fraud *not* occurring "in connection" with the sale of a security as when "a broker embezzles cash from a client's account or takes advantage of the fiduciary relationship to induce his client into a fraudulent real estate transaction"). *See also*, *Menzies v. Seyfarth Shaw LLP*, 197 F. Supp. 3d 1076, 110-12 (N.D. Ill. 2016) (criticizing courts for creating remedial gaps by reading the plain language of the PSLRA bar too broadly and failing to adhere to congressional intent).

Moreover, the Derivative Plaintiffs' allegations concerning conduct that *may* be actionable as securities fraud do not automatically doom their RICO claims. For example, in *Picard v. Kohn*, 907 F. Supp. 2d 392 (S.D.N.Y. 2012), Judge Rakoff analyzed whether a RICO claim could be asserted against entities allegedly involved in furthering the Madoff Ponzi scheme. *Id.* at 398. The first step of the scheme, the "Money In" component, was actionable securities fraud, because it involved the allegedly misleading solicitation of money to feed the scheme. Thus, under the teachings of *MLSMK*, "the PSLRA's RICO amendment prevent[ed] the [plaintiff] from basing his RICO claims on any conduct related to the 'Money In' component of the purported scheme." *Id.* at 398. But having eliminated this "component" of the plaintiff's allegations from consideration, the court set aside the PSLRA bar and proceeded to properly consider whether the plaintiff's remaining allegations stated a RICO claim. The court ultimately dismissed the plaintiff's claim but did not rely on the PSLRA in doing so. *See id.* at 399 (finding that even "[e]xcluding all allegations related to the 'Money In' component of the purported scheme, the Trustee's remaining allegations" did not "state a claim under Fed. R. Civ.

P. 12(b)(6)"); *Id.* at 401 ("[S]tripped of allegations relating to the 'Money In' component of the purported scheme, the SAC fails to state a claim . . . .").

As in *Picard*, this Court may properly distinguish between the earlier chapter of Defendants' fraudulent course of conduct – the objective of which was to obtain JFURTI and Frydman's valuable assets through gross misrepresentations regarding the Sale as reflected in the Master Agreement and later the Settlement Agreement – and the later bust out of First Capital REIT's assets through fraudulent wire transfers, misrepresentations about First Capital's assets, and the planned collusion with the Forum Defendants and the Presidential Defendants in the purported "sale" to Presidential. The earlier chapter does give rise to securities fraud (as asserted by the Derivative Plaintiffs in this Action), and the later series of frauds alone gives rise to actionable violations of RICO as demonstrated above. By the reasoning of *Picard*, this component can stand on its own as predicate racketeering activity. The bust-out scheme is not being carried out "in connection with" the fraudulent securities transactions which form the basis of the Derivative Plaintiffs' Exchange Act claim. *See Absolute Activist Value Master Fund v. Devine*, No. 2:15-cv-328, 2017 U.S. Dist. LEXIS 17492, at *51-52 (M.D. Fla. Feb. 8, 2017) (rejecting application of PSLRA bar, where plaintiffs were victims of a "massive market manipulation scheme (the 'Penny Stock Scheme')" and asserted a RICO claim based upon "acts attributed to defendant [that] all flow from the efforts to conceal and preserve the proceeds of the successful securities fraud scheme"—through money laundering and similar predicate acts—that "took place after the purchase or sale of securities"). Instead, the bust-out activities are "independent events." *Ouwinga v. Benistar 419 Plan Servs.*, 694 F.3d 783, 790-91 (6th Cir. 2012) (in conjunction with an alleged scheme to defraud through impermissible tax strategies involving securities, the court affirmed the district court's finding that "the PSLRA did not bar the [plaintiffs'] RICO claims because the fraud and the securities transactions were essentially independent events"). *See also Kottler v. Deutsche Bank AG*, 607 F. Supp. 2d 447, 458 n.9 (S.D.N.Y. 2009) (in another tax shelter case, court declined to apply PSLRA bar; although the court found there was "nothing per se fraudulent from a securities standpoint," the critical fact was that "the alleged fraud here involved a tax scheme, with the securities transactions only incidental to any underlying fraud").

The SEC filings discussed in the FAC and Case Statement also do not trigger the PSLRA bar. The Form 8-K filings are merely evidence of defendants' scheme to siphon the assets of First Capital REIT and of the RICO Defendants' concealment of this scheme through incomplete disclosures. *See Kayne v. Ho*, No. LA CV09-06816, 2012 U.S. Dist. LEXIS 192916, at *34-36 (C.D. Cal. Sep. 6, 2012) (where "the purpose of the enterprise was to launder money and avoid creditors," and where plaintiffs did not allege that filings with the SEC "artificially inflated stock value, or affected the purchase or sale of securities" but instead relied on such filings to allege that defendants "truthfully reported some of the related party transactions alleged to constitute money laundering," court found the conduct is "not actionable as securities fraud" and "the PSLRA bar does not apply"). The underlying predicate acts alleged, Singal's misrepresentations and the numerous wire transfers involving Forum, FCREI, Tilden and various third parties, do not form the basis for actionable securities fraud. *Fleet Nat'l Bank v. Boyle*, No. 04-CV-1277, 2005 U.S. Dist. LEXIS 44036, at *19-21 (E.D. Pa. Sep. 12, 2005) (where plaintiff alleged that "10-Ks were among the fraudulent financial reports and certifications provided to the [Plaintiffs] upon which [Plaintiffs] relied in making credit decisions in continuing to extend credit to [Defendants]," this alleged fraud could form a predicate act under RICO, because it was not committed in connection with the buying or selling of securities).

Plaintiffs recognize that several courts in this district have, contrary to *Picard*, found a RICO count barred by the PSLRA where the plaintiff pled a single, fraudulent RICO scheme, at least part of which was actionable as securities fraud. *See, e.g.*, *Gilmore v. Gilmore*, 2011 U.S. Dist. LEXIS 99441, at *11-18 (S.D.N.Y. Sep. 1, 2011), aff'd 503 F. App'x 97 (2d Cir. 2012); *Ling v. Deutsche Bank, AG*, No. 04-CV-4566, 2005 U.S. Dist. LEXIS 9998, at *13-14 (S.D.N.Y. May 26, 2005); *Blythe v. Deutsche Bank AG*, 399 F. Supp. 2d 274, 279-83 (S.D.N.Y. 2005). For two primary reasons, these cases do not control the outcome here.

First, the Second Circuit articulated the proper rule in *MLSMK*, requiring a district court to ask whether the non-securities-related predicate acts occurred "in connection with" the alleged securities fraud. *See MLSMK Inv.*, 651 F.3d at 277 n.11. Mere "relatedness" of the predicate acts or the pleading of a single fraudulent enterprise is not enough to trigger the PSLRA bar. And although *Picard* is not explicit on this point, by definition, the remaining conduct which that court considered to assess the RICO count could not have been "in connection with" fraud in the purchase or sale of securities. *See Picard*, 907 F. Supp. 2d at 399-401. If that conduct had occurred in connection with the purchase or sale of securities, *the PSLRA would have barred the entire RICO claim*, not merely a portion of it.

Second, even if this Court were to find the RICO claim barred by the PSLRA based on isolated paragraphs which arguably swept securities fraud into the pattern of predicate acts, Plaintiffs respectfully request leave to remedy this technical deficiency. Indeed, rather than dismiss a PSLRA-barred RICO claim outright, several courts have given plaintiffs First Capital Opportunity to replead a RICO claim to exclude reliance on any securities fraud-related conduct. *See Ling*, 2005 US Dist. LEXIS 9998, at *22-23; *Blythe*, 399 F. Supp. 2d at 279-83. Plaintiffs respectfully request the same opportunity here. The Derivative Plaintiffs have pled conduct that supports and independent pattern of racketeering, actionable under RICO. To dismiss their RICO claim with prejudice simply because of a concurrent Exchange Act claim and the incorporation of certain allegations that could be actionable as securities fraud would place form over substance.

V. The FAC Sufficiently Alleges a RICO Conspiracy

RICO is to "be liberally construed to effectuate its remedial purposes," *Sedima*, 473 U.S. at 498, and the Court must analyze a Complaint's allegations of a Section 1962(d) conspiracy under the liberal pleading requirements of Rule 8(a). *See Angermeir v. Cohen*, 14 F. Supp. 3d 134, 154-155 (S.D.N.Y. 2014); *Spira*, 876 F. Supp. at 561 ("an allegation of conspiracy in a RICO claim is not subject to Rule 9(b) because it is not an averment of fraud").

To find an adequately pled violation of 18 U.S.C. § 1962(d), the Court need only inquire as to "whether an alleged conspirator knew what the other conspirators 'were up to' or whether the situation would logically lead an alleged conspirator to suspect he was part of a larger enterprise." *United States v. Zichettello*, 208 F.3d 72, 99 (2d Cir. 2000).

Importantly, an alleged RICO conspirator need not have personally committed a predicate act, or even an overt act in furtherance of the RICO conspiracy. *Salinas v. United States*, 552 U.S. 52, 63 (1997); *accord United States v. Yannotti*, 541 F.3d 112, 122 (2d Cir. 2008) ("Salinas held that to be found guilty of RICO conspiracy, a defendant need only know of, and agree to, the general criminal objective of a jointly undertaken scheme", and "[a] defendant's agreement to join a conspiracy can be inferred from circumstantial evidence of the defendant's status in the enterprise or knowledge of wrongdoing."). *N.Y. Dist. Council of Carpenters Pension Fund v. Forde*, 939 F. Supp. 2d 268, 282 (S.D.N.Y. 2013); *Morrow v. Black*, 742 F. Supp. 1199, 1208 (E.D.N.Y. 1990) ("The defendant's agreement may be inferred from circumstantial evidence of his status in the enterprise and his knowledge of the wrongdoing.") (citing *United States v. Rastelli*, 870 F.2d 822, 832 (2d Cir. 1989)). As a consequence, the threshold for stating a claim under § 1962(d) is low; such a claim will not be dismissed so long as facts are alleged which support an inference that an agreement to conspire existed. *See Angermeir v. Cohen*, 14 F. Supp. 3d at 155 (citing *U.S. Fire Ins. Co. v. United Limousine Serv., Inc*., 303 F. Supp. 2d 432, 454 (S.D.N.Y. 2004) (denying motion to dismiss RICO conspiracy claim where "conclusory statements [in the complaint] [were] buttressed by . . . more specific allegations")).

Plaintiffs again cherry-pick one paragraph from the FAC and argue that it alone does not state facts from which this Court can infer each RICO Defendant's knowledge of and agreement to the general criminal objective of the "jointly undertaken scheme." [¶175] The RICO Defendants ignore, however, the host of allegations specifying the coordinated behavior of each of the three subgroups of defendants. Certainly, Singal, Vande Steeg, McCook, and the First Capital entities under their control were aware of this criminal objective, as reflected in their orchestration and authorization of the fraudulent misrepresentations to Frydman regarding the missing $17 million in public funding. [Predicate Act #7] Indeed, Vande Steeg and McCook "affirmatively sought to deny and conceal from Plaintiffs information about the missing funds" [¶26(c)], and "explicitly approved the $16.03 per share NAV for First Capital REIT, without any adequate public disclosure to support this questionable increased valuation." [Case Statement p. 17] These defendants all participated in the wire transfers from the Forum Defendants [Predicate Act #9] and the subsequent transfer of nearly $3.5 million back to the Forum Defendants. [Predicate Act #14] Later, Singal, Grant, Leider and the First Capital entities allowed "the continued dissipation of First Capital REIT, including but not limited to, all transfers wired since that time from Tilden's account, participation in the Presidential REIT sale, and further dissipation of real property through sales of Tilden's property and the Fox property." [Case Statement p. 18; Predicate Acts #23-28]

Platt personally informed Frydman "that he was in the process of acquiring control of First Capital REIT, or the real property assets under First Capital REIT's control, through a series of agreements with Singal and his affiliated entities." Again, it is well-pleaded that Platt, through Forum and Marble, was aware of the scope of the fraud and agreed to participate in it. [¶120]

Likewise, the Presidential Defendants knew of the overarching criminal objectives of the Enterprise. Presidential REIT is "broke," but agreed to serve as the receptacle for the combined First Capital REIT and Forum business under the "Presidential" name. [¶158] The inculpating knowledge of both Presidential and Presidential OP (formed for purposes of the planned acquisition) can also be inferred from the agreement to exchange worthless interests in Presidential OP and/or Presidential REIT for over $37 million in real-estate assets. [¶¶104, 109, 110] And these defendants' participation can also be inferred from their efforts to conceal the nature of the transaction through incomplete public disclosures, especially relating to this purported "consideration." [¶112] These allegations, along with the details regarding each defendant's actual participation as set forth above and in the Case Statement, demonstrate that each RICO Defendants knew what their co-conspirators "were up to" and that they were all part of the larger criminal enterprise.

VI. Plaintiffs have alleged Count III with sufficient particularity.

The FAC sufficiently alleges all of the elements of a claim under 15 U.S.C. § 78(j)(b) ("Section 10(b)") and Rule 10b-5 (Count III), and therefore the Court should not dismiss Count

III.[6/] *See* FAC ¶¶ 181-188. To sustain a claim under Section 10(b) and Rule 10b-5, Plaintiffs must allege "(i) a material misrepresentation or omission; (ii) scienter; (iii) a connection with the purchase or sale of a security; (iv) reliance by the plaintiff(s); (v) economic loss; and (vi) loss causation." *CILP Assocs., L.P. v. Pricewaterhouse Coopers LLP*, 735 F.3d 114, 122 (2d Cir. 2013).

Defendants do not dispute that Plaintiffs have sufficiently alleged material misrepresentations; scienter; economic loss; or loss causation. The basis of the Defendants' Motion, then, is that (1) First Capital OP lacks standing, (2) Frydman and JFURTI are not adequate representatives; (3) Singal's fraud was not in connection with First Capital REIT's "purchase or sale of a security"; and (4) First Capital REIT cannot rely on Defendant's misrepresentations in connection with the Master Agreement and Asset Contribution Agreement. Each of Defendants' arguments fails.

1. Plaintiffs properly bring a derivative claim under Section 10(b) and Rule 10b-5 on behalf of First Capital REIT and First Capital OP.

As demonstrated above, Plaintiffs clearly allege that they are shareholders of First Capital REIT and therefore have standing to bring a derivative lawsuit on behalf of the REIT, which fully controls and has standing to bring a derivative lawsuit on behalf of First Capital OP. (See supra at Section III(C)).

More specifically, as shareholders of First Capital REIT, Plaintiffs clearly have standing to bring derivative claims on behalf of First Capital REIT and its wholly owned subsidiary, First Capital OP, under Section 10(b) and Rule 10b-5, as Plaintiffs Frydman and JFURTI have done in

[6/] Count III is captioned "Violation of Section 10(b) of the Exchange Act, 15 U.S.C. § 78(j)(b) and Rule 10b-5, 17 C.F.R. § 240.10b-5 Derivatively by Plaintiffs on Behalf of First Capital REIT and First Capital OP against Defendant Singal." FAC at p. 55.

Count III.[7/] *See Schoenbaum v. Firstbrook*, 405 F.2d 215, 219 (2d Cir. 1968) (holding that a complaint stated a triable claim under Section 10(b) and Rule 10b-5 of the Securities Exchange Act of 1934 because "[t]he stockholders of [corporation] may bring a derivative action for damages to the corporation suffered by reason of a violation of Section 10(b) and Rule 10b-5") (citing *Ruckle v. Roto Amer. Corp*., 339 F.2d 24 (2d Cir. 1964)); *Hooper v. Mountain States Sec. Corp*., 282 F.2d 195 (5th Cir. 1960), *cert. denied*, 365 U.S. 814 (1961)). As the Second Circuit recently explained in the context of a Section 10(b) and Rule 10b-5 case, "[s]hareholders generally lack standing to assert individual claims in their own name based on injury to the corporation and must instead bring such claims derivatively on behalf of the corporation." *CILP Assocs., L.P.*, 735 F.3d at 122 (citing *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1101 (2d Cir. 1988). *See also Klebanow v. New York Produce Exchange*, 344 F.2d 294, 297 n.2 (noting the "'double derivative' action by a stockholder of a corporation owning the stock of the injured corporation") (citing *Holmes v. Camp*, 180 App. Div. 409, 167 N.Y.S. 840 (1917); *Goldstein v. Groesbeck*, 142 F.2d 422, 425 (2nd Cir.), *cert. denied*, 323 U.S. 737 (1944); 2 Hornstein, Corporation Law and Practice § 712 at 193-94 & n. 13-14 (1959)).

2. Plaintiffs have sufficiently alleged a misrepresentation in connection with the purchase or sale of a security.

Defendants argue that Count III does not meet the requirement that a securities fraud must be in connection with the purchase or sale of a security because First Capital REIT did not buy or sell shares. Defendants assert that "[c]onspicuously absent from the FAC is any allegation that First Capital REIT ever bought or sold any securities itself" and contend that "this

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[7/] While Plaintiffs may have released some other their individual claims in connection with the FC Defendants' fraudulent actions in this regard, claims belonging to First Capital REIT and the Operating Partnership have never been waived (nor could Plaintiffs have waived claims belonging to such companies), and apply equally to First Capital REIT's shareholders and the Operating Partnership's limited partners. FAC, ¶ 69.

was a sale of First Capital REIT shares and not a sale by First Capital REIT itself." Singal MTD at p. 57.[8/]

Most significantly, Defendants do not—and cannot—even attempt to apply this argument to derivative Plaintiff ***First Capital OP***. In fact, the FAC alleges that First Capital OP units were transferred through the Master Agreement in exchange for a portfolio of real estate assets (transferred through the Asset Contribution Agreement), the value of which Singal misrepresented. *See* FAC ¶¶ 4, 52, 63, 64; *see also* FAC, Levine Decl., Ex. K-1 § 5.10(a); Dkt. 42-12. Accordingly, Defendants essentially concede that Count III alleges the "in connection with" element of securities fraud as to First Capital OP.

Indeed, the FAC sets out the transactions that are the basis of Count III in detail, as do the Master Agreement and the Asset Contribution Agreement. Put simply, the FAC alleges that Defendants, including Singal, agreed to make payments and contribute a portfolio of real estate assets to First Capital OP (then named United Realty Capital Operating Partnership, LP) ***in exchange for units*** in the Operating Partnership:

- "As consideration for Plaintiffs' sale, Singal, FCREI and the FC Private Entities agreed to make a series of monetary payments to Plaintiffs and contribute a portfolio of real estate assets and contract rights to First Capital REIT's Operating Partnership, ***in exchange for OP Units***, pursuant to an Asset Purchase Agreement, which was entered simultaneously." FAC ¶ 52 (emphasis added).

- Section 5.10 of the Master Agreement—which contains numerous representations and warranties regarding the UPREIT Assets—provides that the parties would execute the Asset Contribution Agreement and Buyer, including Singal, would "contribute a portfolio of its real estate assets and contract rights with a fair market value of not less than [$ 140] million, subject to not more than [$55] million of debt, and in which Buyer has ***not less***

8/ Defendants rely on *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 731 (1975) (Singal MTD at 57). In *Blue Chip Stamps*, the complaint failed because it was based on allegations that class members, because of and in reliance on a false and misleading prospectus, ***failed to purchase*** the offered units. *Id.* at 727. By contrast, Plaintiffs here fall within *Blue Chip's* requirement for the purchase or sale of a security because the fraud involved the transfer of misrepresented real estate assets *in exchange for* operating units in First Capital OP.

than [$85] million in net equity . . . to the OP (or a TRS) . . . ***in exchange for the issuance of OP Units*** equal to the total equity which the Buyer has in the UPREIT Assets at an exchange ratio of $12.49 op OP Unit. . . ." (FAC, Levine Decl., Ex. K-1 § 5.10(a) (emphasis added).[9/]

Moreover, the misrepresentations were made "in connection with the purchase and sale of a security" because the real estate assets were contributed *in exchange for the OP units*: "In connection with the Master Agreement, and as reported by the FC Defendants in an amended 8-K filing with the SEC on September 25, 2015, $53,831,138 of the total $175 million in contributed assets, which were required to be contributed by the FC Defendants to First Capital REIT *in exchange for approximately* $42 million of OP Units in First Capital REIT's Operating Partnership (of which $9,599,797 represented the "equity" value of those contributed assets) was represented by certain hotel properties located in Houston, Texas (the "Houston Hotels")". FAC ¶ 63. Despite Singal's express representations and warranties to the contrary, within 10 days of the executing the Master Agreement and the Asset Contribution Agreement, due to a default on approximately $42 million of mortgage debt secured by the Houston Hotels, their former owners had placed the Houston Hotels into a voluntary Chapter 11 reorganization proceeding under the federal bankruptcy laws. FAC ¶ 65. Consequently, because Singal's misrepresentations regarding the value of the real estate assets contributed to First Capital OP in exchange for OP units were made "in connection with" the purchase of sale of securities, Plaintiffs have sufficiently alleged misrepresentations ***in connection with*** the purchase or sale of a security. FAC ¶¶ 4, 52, 63, 64; *see also* FAC, Levine Decl., Ex. K-1 § 5.10(a); Dkt. 42-12.

Indeed, "Judges in this District have repeatedly rejected the contention that the alleged fraud or misrepresentations must relate to the value of the securities purchased or sold. They

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[9/] Documents that are attached to the complaint or incorporated in it by reference are deemed part of the pleading and may be considered on a motion to dismiss. *In re Bear Stearns Cos., Inc. Sec., Derivative, & ERISA Litig.*, 763 F. Supp. 2d 423, 584 (S.D.N.Y. 2011).

have consistently held that fraud pertaining to assets given as consideration for securities satisfies the 'in connection with' requirement." *Uni-World Capital, L.P. v. Preferred Fragrance Inc.*, 2014 U.S. Dist. LEXIS 109919, at *25-26 (S.D.N.Y. Aug. 8, 2014).

Uni-World Capital, L.P. squarely addresses a misrepresentation regarding the value of an asset exchanged for securities. There, the court denied a motion to dismiss a rule 10b-5 claim and found that the complaint alleged the "in connection with" element. The complaint alleged fraud pertaining to the sale of defendants' assets through an Asset Purchase Agreement, the consideration for which included membership units. Defendants misrepresented the value of the company purchased through an Asset Purchase Agreement. The court found that the complaint "recites that the 'total consideration' paid by defendants included 'units of membership interest in [the company] representing 18.16% of the outstanding voter equity of [the company]' and rejected defendants' argument that no misrepresentation in connection with the purchase or sale of a security has been alleged, explaining that "[t]he Second Circuit long ago held that fraud pertaining to the consideration in a securities transaction is in connection with that transaction." *Id*. at *25 (citing *S.E.C. v. Drysdale Sec. Corp*., 785 F.2d 38, 42 (2d Cir. 1986)) (internal quotations omitted). In similar circumstances to this case, another court found that the "in connection with" element of 10b-5 was satisfied. *Schoenbaum*, 405 F.2d at 219. In *Schoenbaum*, the court found that ***the issuance*** by a company of its stock to defendant "was a sale of securities within the meaning of Section 10(b) and Rule 10b-5." *Id.*

Defendants' argument fails with respect to First Capital REIT as well. As described more fully above, First Capital REIT has double derivative standing to bring Count III.

1. Plaintiffs have adequately alleged reliance.

Defendants contend that First Capital REIT could not have relied on Singal's misrepresentations because it was not a party to the Master Agreement or the Asset Contribution

Agreement. Singal MTD at 58. Defendants do not make this argument as to First Capital OP, thereby acknowledging that Count III alleges reliance as to First Capital OP.

The FAC does, in fact, allege First Capital REIT's reliance on the misrepresentations: "Singal misstated and omitted material facts with intent to defraud and with reckless disregard for the truth, and First Capital REIT and the Operating Partnership justifiably relied on Defendants' statements and omissions to their detriment." FAC ¶ 184. Indeed, in reliance on the misrepresentations in connection with the Master Agreement and the Asset Contribution Agreement, First Capital OP issued OP Units "equal to the total equity which the Buyer has in the UPREIT Assets at an exchange ratio of $12.49 per OP Unit. . . ." (FAC, Levine Decl., Ex. K-1 § 5.10(a)). First Capital REIT owns approximately 100% of First Capital OP, and exercises total control over the operations of First Capital OP. FAC ¶ 49.

For this same reason, Defendants' assertion that First Capital REIT could not rely because it was not a party to the Master Agreement and the Asset Contribution Agreement is a red herring. The entity now called First Capital OP (which is controlled by First Capital REIT) was then called United Realty Trust, Inc., and was a party to the Asset Contribution Agreement and its OP units were a subject of the Master Agreement. FAC, Levine Decl., Ex. K-1 § 5.10(a); Dkt. 42-12. Indeed, Section 7.12 of the Master Agreement sets forth the rebranding that occurred as part of the Master Agreement. It provides that "[t]he parties have agreed that promptly after the Closing the Buyer shall re-brand REIT as "First Capital REIT", and the Companies shall each change "United Realty" or "UR" in their names to "First Capital." Thus, United Capital Operating Partnership L.P. (a party to the Asset Contribution Agreement) was simply renamed as First Capital Operating Partnership L.P., which is the derivative operating partnership plaintiff in the 10b-5 claim (count III) (Dkt. 42-11).[10/] It is not contested that First Capital OP relied on Singal's misrepresentations and the FAC has sufficiently alleged that its parent, First Capital REIT, also relied on such misrepresentations.

2. Defendants do not contest, nor can they, that Plaintiffs have adequately alleged misrepresentations, scienter, and damages

Defendants do not contest that the FAC adequately alleges misrepresentations regarding the value of real estate assets, along with numerous other misrepresentations in the Master Agreement and the Asset Contribution Agreement. *See* FAC ¶¶ 185-187. And they cannot do so. Courts have found misstatements about the value of a property sufficient to allege a misrepresentation for a Rule 10b-5 claim. *E.g.*, *Uni-World Capital, L.P.*, 2014 U.S. Dist. LEXIS 109919, at *25-26; *see also Sturm v. Marriott Marquis Corp.*, 85 F. Supp. 2d 1356, 1368 (N.D. Ga. 2000) (finding allegations of securities fraud under 10b-5 sufficient to meet Rule 9(b) where defendant allegedly "failed to disclose an appraisal by Arthur Consulting that valued the Hotel at approximately $ 20 million more than the AAA appraisal utilized in the REIT Statement").

In fact, throughout the FAC, Plaintiffs have alleged misrepresentations in connection with the Master Agreement and Asset Contribution, and thus have sufficiently alleged particular misrepresentations supporting Count III:

- Pursuant to the transaction documents, the FC Defendants, including Singal, made numerous representations and warranties to First Capital REIT and the Operating Partnership, ***as a material inducement to enter into those agreements,*** at Section 5.10 of the Master Agreement, about the Houston Hotels and all of the other assets contributed by the FC Defendants. FAC ¶ 64.

[10/] *See also* FAC, ¶ 4: In the "Master Agreement, the United Realty entities were rebranded as "First Capital" entities, and United Realty Trust Incorporated became First Capital REIT. By virtue of the transaction, Singal, FCREI and the FC Private Entities became the sole control person of First Capital REIT. Moreover, Singal, FCREI and the FC Private Entities transferred and contributed securities, deeds and contract rights to First Capital OP, the operating partnership of First Capital REIT, which assumed the debt associated with those assets. Singal then used Operating Partnership limited partnership units to pay for and collateralize the transaction."

- Notwithstanding the FC Defendants' (including Singal) "express representations and warranties to the contrary, as disclosed just ten days later in an amended 8-K filing with the SEC on September 25, 2015, the FC Defendants disclosed: Due to a maturity default with respect to approximately $42 million of mortgage debt secured by the Houston Hotels (the "Houston Hotels Debt"), their former owners had placed the Houston Hotels into a voluntary Chapter 11 reorganization proceeding under the federal bankruptcy laws (the "Proceeding")." FAC ¶ 65.

- The FC Defendants (including Singal) "not only materially misrepresented the state of facts with respect to the Houston Hotels, but shortly after the filing of the September 25, 2015 amended 8-K, upon information and belief, the Houston Hotels were simply transferred out of First Capital REIT, with no consideration whatsoever, to other affiliates of the FC Defendants, resulting in the loss of at least $9,599,797 by First Capital REIT and the Operating Partnership." FAC ¶ 67.

Moreover, Count III of the FAC includes 12 pages of representations contained in the Master Agreement as well as the Asset Contribution Agreement—to which First Capital OP (at the time named United Realty Operating Partnership, LP) was a party—that were not true. FAC ¶¶ 182-187. These allegations are more than enough to adequately plead a 10b-5 violation.

Rather than assert that Plaintiffs' extensive allegations identifying Singal's misrepresentations are not sufficient, Defendants' instead argue that Singal had no duty to speak. Singal MTD at 58. But their argument misses the mark. Under Section 10(b) and Rule 10b-5, Plaintiffs must show either a "material misrepresentation ***or*** omission." *CILP Assocs., L.P.*, 735 F.3d at 122. Thus, even if Singal did not have a duty to speak, Plaintiffs have adequately alleged numerous affirmative material misrepresentations sufficient to allege securities fraud, and therefore the Court should not dismiss Count III. *See* FAC ¶¶ 4, 52, 63, 64; *see also* FAC, Levine Decl., Ex. K-1 § 5.10(a).

Defendants also do not argue that Plaintiffs have failed to allege scienter, thus Defendants concede this element has been adequately alleged. Indeed, the fact that Defendants put the Houston Hotels into Chapter 11 bankruptcy—within 10 days of closing the Master Agreement and the Asset Contribution Agreement—is more than sufficient to allege that Singal, among others, acted with scienter. *In re Leslie Fay Cos. Sec. Litig.*, 871 F. Supp. 686, 691 (S.D.N.Y. 1995) (allegations of "facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness" may be sufficient to overcome a motion to dismiss) *(citing Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1128 (2d Cir. 1994)).

Finally, throughout the FAC, Plaintiffs allege that they have been damaged, and such damage was caused by Singal's wrongful conduct: "[a]s a direct and proximate result of Defendants' wrongful conduct, First Capital REIT and the Operating Partnership have suffered damages, including but not limited to the receipt of property at a value less than represented and/or with encumbrances greater than represented." FAC ¶ 188. Accordingly, the Court should not dismiss Count III. In the alternative, if the Court were to dismiss Count III, Plaintiffs request leave to amend to cure any pleading deficiencies.

VII. Plaintiffs Have Stated State Law Claims That Survive Defendants' Motions To Dismiss[11/]

A. The Complaint Alleges Breaches of Fiduciary Duty, Waste and Mismanagement, And Aiding and Abetting Thereof

1. The Internal Affairs Doctrine And Governing Law:

Defendants misapply and misconstrue the law relevant to the fiduciary duty, waste and mismanagement, and aiding and abetting claims (Claims 4, 5, 16 and 17). For the reasons set forth below, Maryland law is only applicable to fiduciary duty claims against the current officers and directors of First Capital REIT; New York law governs the remaining fiduciary duty and aiding and abetting fiduciary duty claims brought on behalf of First Capital REIT and OP.

[11/] The FAC asserted claims against First Capital REIT in Claims 19-26 for injunctive relief and the turnover of receivables. Plaintiffs will not pursue those Claims against the REIT (though it will continue to pursue them against Singal).

First Capital REIT is incorporated in Maryland. FAC ¶49. Pursuant to New York conflicts of laws principles, only the fiduciary duty claims brought on behalf of First Capital REIT against its officers and directors are governed by Maryland law. *See Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 446 F. Supp. 2d 163, 191-192 (S.D.N.Y. 2006) (state of incorporation governs the internal affairs and fiduciary obligations of each corporation); *Buckley v. Deloitte & Touche USA LLP*, 2007 U.S. Dist. LEXIS 37107, at *37 (S.D.N.Y. May 22, 2007) (same) (citations omitted).

All remaining breach of fiduciary duty and aiding and abetting fiduciary duty claims asserted on behalf of First Capital REIT and First Capital OP are governed by New York law. This is because the internal affairs doctrine is irrelevant to the fiduciary obligations of those who are not currently officers, directors, shareholders or "insiders" of a corporation. *Culligan Soft Water Co. v. Clayton Dubilier & Rice LLC*, 118 A.D.3d 422, 422 (N.Y. App. Div. 2014) ("internal affairs doctrine does not apply to those defendants who are not current officers, directors, and shareholders" of the relevant corporations); *New Greenwich Litig. Trustee, LLC v. Citco Fund Servs. (Europe) B.V.*, 145 A.D.3d 16, 22 (N.Y. App. Div. 2016) (rejecting application of internal affairs rule to "outside administrators and auditors, i.e. contractual agents or third parties external to the funds") (internal citations and quotations omitted).

Where the internal affairs doctrine is inapplicable, the Court shall apply tort conflicts of laws principles to the derivative claims for breach of fiduciary duty, waste and mismanagement. Applying those principles leads to a choice of New York law. *See In re Pfeifer*, 2013 Bankr. LEXIS 4410, at *7 (Bankr. S.D.N.Y. Oct. 23, 2013) (categorizing the breach of fiduciary duty as a tort claim under New York Law). "New York's interest analysis requires that the law of the jurisdiction having the greatest interest in the litigation will be applied and the only facts or contacts which obtain significance in defining State interests are those which relate to the purpose of the particular law in conflict." *In re Thelen LLP*, 736 F.3d 213, 219 (2d Cir. 2013) (brackets, alteration, and internal quotation marks omitted), certified question accepted sub nom. *Geron v. Seyfarth Shaw LLP*, 736 F.3d 213 (N.Y. App. Div. 2013). "[T]he significant contacts are, almost exclusively, the parties' domiciles and the locus of the tort." *In re Thelen LLP*, 736 F.3d at 219-20 (internal quotation marks omitted). For breach of fiduciary duty claims, "the law of the jurisdiction where the tort occurred will generally apply because that jurisdiction has the greatest interest in regulating behavior within its borders." *2002 Lawrence R. Buchalter Alaska Trust v. Phila. Fin. Life Assur. Co.*, 96 F. Supp. 3d 182, 217-218 (S.D.N.Y. 2015). "A tort occurs in the place where the injury was inflicted, which is generally where the plaintiffs are located." *Id.* at 217.

Furthermore, aiding and abetting breach of fiduciary duties or waste and mismanagement claims are considered "garden-variety" torts and those also are governed by the law of the place where the acts giving rise to the claim occurred. *See Solow v. Stone*, 994 F. Supp. 173, 177 (S.D.N.Y. 1998), *aff'd*, 163 F.3d 151 (2d Cir. 1998); *Granite Partners, L.P. v. Bear, Stearns & Co. Inc.,* 17 F. Supp. 2d 275, 306 n.16 (S.D.N.Y. 1998) (agreeing with *Solow v. Stone* court that aiding and abetting breach of fiduciary claim is governed by law of place where the acts giving rise to the claim took place); *accord In re Adelphia Commc'ns Corp.*, 365 B.R. 24, 40-41. Applying this analysis to all Defendants other than the current directors, the governing law is New York. Both Plaintiffs are domiciled in New York. OP's principal place of business is New

York. All of the conduct that constituted a breach of the fiduciary duty to First Capital REIT and OP occurred in New York. As such, the injury was inflicted in New York.[12/]

2. Breaches of Duty By FC Defendants

FC Defendants argue that the fiduciary duty claims should be dismissed because (1) Maryland law requires a showing that plaintiff identify an appropriate relationship, describe how the duty was breached, and show that no other remedy is available; (2) plaintiffs fail to allege a fiduciary duty owed by Tilden, FCREI and First Capital Borrower; and (3) Maryland law does not permit fiduciary duty claims against directors Leider and Grant, because they were not directors when the wrongful acts occurred. The FC Defendants' analysis is flawed for the following reasons.

As set forth above, Maryland law applies only to the claims of breach of fiduciary duty against the individual defendants who currently are directors of First Capital REIT – i.e. Singal, Vande Steeg and McCook. New York law applies to all the remaining claims.

a. Claims Against Singal, Vande Steeg and McCook

The FAC clearly and sufficiently states a claim for breach of fiduciary duty against Singal, Vande Steeg and McCook. As Defendants concede, Maryland law recognizes a fiduciary duty based on the corporation-director relationship. Singal MTD at p. 61. In particular, Maryland law recognizes claims for a breach of the duty of candor. *E.g., Shenker v. Laureate Educ., Inc.*, 411 Md. 317, 354, 357 (2009).

The FAC clearly sets forth the directors and their roles vis-à-vis First Capital REIT – Singal as control person and CEO (FAC ¶ 4, 10, 46, 146, 156). Vande Steeg as independent director (*Id.* ¶ 37); and McCook as independent director (*Id.* ¶ 38).

The FAC also alleges that the directors, along with the other FC Defendants, each owed a duty of good faith, fair dealing, loyalty and care to the corporation (FAC

[12/] The Forum Defendants tacitly concur with Plaintiffs' analysis, as all the cases they cite arise under New York law, rather than the laws of Maryland or Delaware.

¶191), and those duties were breached when they permitted inter alia (a) First Capital REIT to fail to file financial statements; (b) First Capital REIT to represent to the public the NAV per share without disclosing any details or methodology or releasing any underlying appraisals; (c) First Capital REIT to default on three mortgages in its portfolio that were personally guaranteed by Frydman, but were assumed by Singal and First Capital REIT as a part of the Master Agreement, and with respect to which Frydman has been contractually indemnified; (d) losing title to a portfolio property for nonpayment of property taxes; (e) dissipation and loss of the Houston Hotels; (f) dissipation and loss of cash obtained through stock sales; (g) borrowing a $15 million loan from the Forum Defendants in exchange for a secret commitment to transfer the assets of First Capital REIT, free and clear of liability to Plaintiffs, to a new entity controlled by Singal and the Forum Defendants; (h) causing private loans and other obligations to be repaid with cash assets belonging to First Capital REIT; and (i) undertaking and approving dissipation of assets and the sale to Presidential REIT. FAC ¶¶ 194-195. Furthermore, the FAC alleges that all FC Defendants – including Singal, Vande Steeg and McCook – actively concealed facts from shareholders, investors and creditors (FAC ¶¶ 10, 26(c) and 67). Therefore the FAC adequately alleges a claim for breach of fiduciary duty under Maryland law.

b. Claims Against First Capital Advisors, FCREI, First Capital Borrower and Tilden

Under New York law, a plaintiff asserting breach of fiduciary duty "must demonstrate the existence of a fiduciary duty between the parties and a breach of that duty by the defendant." *Thermal Imaging, Inc. v. Sandgrain Sec., Inc.*, 158 F. Supp. 2d 335, 343 (S.D.N.Y. 2001). Here, as set forth in subsection (a) above, the standard is easily met and even exceeded.

In fact, the FAC alleges that Singal, FCREI, First Capital Advisors and First Capital Borrower all were control persons of First Capital REIT. FAC ¶ 4. Control persons have fiduciary obligations. *See Banco de Desarrollo Agropecuario, S.A. v. Gibbs*, 709 F. Supp. 1302, 1306 (S.D.N.Y. 1989) ("[c]ontrol persons owe exacting fiduciary duties…"). Furthermore, as Defendants point out, First Capital Advisors had a contractual fiduciary obligation (which is not precluded under New York law, *see Grund v. Del. Charter Guar. & Trust Co.*, 788 F. Supp. 2d 226, 250 (S.D.N.Y. 2011) (citing *Centro Empresarial Cempresa S.A. v America Movil, S.A.B. de C.V.*, 901 N.Y.S.2d 618, 636 (N.Y. App. Div. 2010)) to First Capital REIT. And, as alleged in subsection (a) above, First Capital Advisors, FCREI, First Capital Borrower and Tilden all breached that duty.

c. Claims Against Leider and Grant

Improperly citing Maryland law again, the Defendants argue that Leider and Grant cannot be liable for breaches of fiduciary duty, because they were not directors of First Capital REIT when the alleged wrongdoing occurred. This is legally and factually inaccurate. Grant and Leider both joined the Board of Directors of First Capital REIT on November 11, 2016. On November 28, 2016 after they were appointed to the Board, Leider and Grant authorized the payment of $800,000 from First Capital REIT to Presidential REIT without consideration. FAC ¶¶ 21, 28, 113. Based on this allegation alone, the FAC adequately pleads a claim against Grant and Leider.

3. Waste and Mismanagement

Defendants argue that Plaintiffs have not met their burden, because establishing waste requires a showing that "what the corporation has received is so inadequate in value that no person of ordinary, sound business judgment would deem it worth that which the corporation has paid." (Mot. at 72, *citing Werbowsky,* 362 Md. at 598).[13] Despite the stringent pleading standard, Plaintiffs have done precisely that.

The FAC alleges, for example, that the FC Defendants colluded with the Forum Defendants to divert assets out of the First Capital family of companies by, among other things, obtaining an alleged "loan" of $2.5 million and then repaying that "loan" within 3 months at a $1 million or 160% premium rate of return. FAC ¶¶ 26(d) and 76. It defies credulity that any person of ordinary, sound business judgment would believe that the corporation received adequate value for that loan. The FAC also adequately alleges that the FC Defendants colluded with Presidential REIT, Presidential OP and the Forum Defendants to systematically strip the assets owned by First Capital OP, by transferring them to Presidential REIT and Presidential OP without adequate consideration, in a series of sham transactions which will leave First Capital OP, First Capital REIT and First Capital Borrower as empty shells, incapable of satisfying creditors. FAC ¶¶101-131. This too defies any presumption of business judgment. The FAC also alleges that $17 million raised via an issuance of stock was completed dissipated and the transfer without consideration of $53,831,138 of the total $175 million in assets which were required to be contributed by the FC Defendants to First Capital REIT and First Capital Operating Partnership in exchange for approximately $42 million of OP Units, constitutes waste. Finally, the FAC also alleges that the FC Defendants revalued the net asset value of First Capital REIT by 28% without disclosing any rationale or methodology for the new valuation. This arbitrary and capricious increase in NAV has no rational basis, and has now placed First Capital REIT under investigation by the United States Securities and Exchange Commission's Enforcement Division. FAC ¶ 27.

At this early pleading stage, such allegations are more than sufficient to plead waste and mismanagement. *See, e.g.*, *Telxon Corp. v. Bogomolny*, 792 A.2d 964, 975 (Del. 2001) (denying motion to dismiss waste and mismanagement claims where the factual allegations in the complaint "create a doubt that reasonable directors could have expected the corporation to benefit" from the wrongful acts alleged, even if the doubt could reasonably be resolved in favor of defendants); *Amfesco Industries, Inc. v. Greenblatt*, 568 N.Y.S.2d 593, 595 (N.Y. App. Div. 1991) (denying dismissal motion because every fact pled must be accepted as true, and the amended complaint pled that "directors failed to discharge their duties, depriving the stockholders and creditors of what was owed them").

4. Aiding and Abetting Liability

The Forum Defendants argue, and Presidential REIT and Presidential OP agree, that Plaintiffs' aiding and abetting fiduciary duties claim fails because the FAC does not allege that (1) Plaintiffs were damaged by any breach, and (2) Defendants provided "substantial assistance" to the FC Defendants in breaching their fiduciary obligations. They argue that the aiding and abetting waste and mismanagement claims fail for the same reasons. For the reasons set forth below, the Defendants' analysis is incorrect on both counts.

As the Motion concedes, "Substantial assistance occurs when a defendant *affirmatively assists, helps conceal* or fails to act, when required to do so, thereby enabling the breach to occur." Forum MTD at p. 17 citing *Kaufman*, 307 A.D.2d at 126 (emphasis added.) The FAC is replete with allegations that the Forum and Presidential Defendants helped the FC Defendants not only actively conceal the various breaches, but also affirmatively assisted them. For example, the FAC alleges:

- "[T]he Forum Defendants made a loan of approximately $15 million to the FC Defendants in late May or early June 2016, and took the controlling interests in the FC Defendants and/or related First Capital entities as collateral security for that loan." FAC ¶204.
- "[I]t has always been, and continues to be, the *un-disclosed plan* of the Forum Defendants to use its loan to take control of the FC Defendants and/or related FC entities, and by virtue thereof, First Capital REIT. *Id*. ¶205 (emphasis added).
- "[T]he FC Defendants have yielded their corporate authority to the Forum Defendants and wrongfully permitted the Forum Defendants to exercise (directly or indirectly) control over First Capital Advisor and by virtue thereof, First Capital REIT." (*Id.* ¶206).
- Forum Defendants "have instructed the FC Defendants to take actions, fully knowing that such actions constitute breaches of the FC Defendants' fiduciary duties to First Capital REIT and First Capital OP." (*Id.* ¶207).
- Defendant Presidential REIT and Presidential OP accepted "assets purportedly valued at over $37 million" from First Capital REIT. (*Id.* ¶103). Presidential REIT, despite being an "insolvent shell company whose stock has been hovering

in value at around a dime per share," (Id. at ¶103) entered into a letter of intent with First Capital REIT to buy "substantially all of its assets, and those of its subsidiaries… for Class B shares of limited voting stock of Presidential REIT." (*Id.* at ¶104).

- Pursuant to a Definitive Agreement between First Capital REIT and Presidential REIT, Presidential REIT agreed to accept $800,000 for operating capital and to pay expenses. (*Id.* at ¶113).
- The Definitive Agreement, to which Presidential REIT and Presidential OP were parties, "is a sham, and the disclosures made by all transaction participants were fraudulent, including because they fail to disclose material information with regard to the lack of value received by First Capital REIT in connection with the transaction." (*Id.* at ¶114).

These allegations must be accepted as true. As a result, the FAC properly alleges that the Forum and Presidential Defendants offered "substantial assistance" to the FC Defendants.

Defendants nevertheless mischaracterize the FAC's allegations "on information and belief" as "wholly conclusory." Forum MTD at p. 19. This is nothing more than an improper attempt to apply a heightened, evidence-based summary judgment standard (Rule 56) rather than the appropriate Rule 12(b)(6) standard where all alleged facts must be accepted as true. In any event, New York Courts routinely give Plaintiffs seeking derivative relief some latitude when it comes to pleading the intent, acts and omissions of derivative defendants. According to the New York Court of Appeals, derivative suits like this one are actions in which "almost all possible evidentiary data with respect to the areas of permissible inquiry.... [are] within the exclusive possession of defendants." *Parkoff v. General Telephone & Electronics,* 53 N.Y.2d 412, 417, 425 N.E.2d 820, 822, 442 N.Y.S.2d 432, 434 (1981). A decision which "ends a derivative action at the threshold, before the plaintiff has been afforded the opportunity of pretrial discovery and examination before trial, should not be the means of foreclosing a nonfrivolous action." *Auerbach v. Bennett,* 64 A.D.2d 98, 107-08, 408 N.Y.S.2d 83, 88 (2d Dep't 1978), *modified,* 47

N.Y.2d 619, 393 N.E.2d 994, 419 N.Y.S.2d 920 (1979). Here, Plaintiffs clearly have alleged sufficient facts to defeat the motion.

Defendants rely primarily *Williams v. Calderoni*, 2012 WL 691832 (S.D.N.Y. Mar. 1, 2012) (J. McMahon) to challenge the "upon information and belief pleading." But *Williams*, when read in full context, illustrates precisely why Plaintiffs' claims against Forum and Presidential Defendants are sufficiently pled. The complaint at issue in *Williams* was drafted by a pro se plaintiff who claimed racial and housing discrimination. (*Id*. at *16-17.) Mr. Williams's allegations "on information and belief" lacked any factual support. For example, his complaint alleged: "Caucasian tenants in a Caucasian neighborhood would not be treated in this manner." (*Id*. at 17.) The court concluded that "while a plaintiff is entitled to plead on information and belief, Williams points to no 'information' that will render these statements any more than a speculative claim." The statements therefore failed to meet the *Twombly* and *Iqbal* standard. (Id.)

Here, in sharp contrast, the FAC is far more detailed than the "naked assertions" pled in *Williams*. (See FAC, ¶¶ 201-210.) Accordingly, unlike the pro se plaintiffin *Williams*, the FAC alleges ample "information" about the Forum Defendants' conduct to support Plaintiff's "beliefs."

Second, Defendants argue that the FAC fails to sufficiently allege "*any* damages suffered as a result of any conduct by a Forum Defendant" and "*any actual fact* concerning the Forum Defendants' acts or omissions." Forum MTD at pp. 3, 17-18 (emphasis in original). This is simply untrue.

In a last-ditch effort to attack Plaintiff's allegations made on information and belief, Defendants turn to *Kronos, Inc. v. AVX Corporation*, 81 N.Y.2d 90, 95-97 (1993). While

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Kronos does state the obvious proposition that "damage is an essential element" of a claim sounding in tort, Defendants distort *Kronos* in another veiled effort to improperly swap the Rule 12(b)(6) standard with the heighted Rule 56 standard. Specifically, Defendants take aim at Plaintiff's allegations by suggesting that, "[o]n its face, the FAC makes clear that Plaintiffs have not yet suffered damages from the hypothetical sale of assets as alleged." Forum MTD at p. 18. But as *Kronos* emphasized, the court must assume that "the facts set forth in the amended complaint are true. . . . " (*Id.* at *92.) (*See, e.g.*, FAC ¶209.)

Additionally, the FAC provides several examples of damages resulting from the Forum Defendants' conduct. For example, FAC paragraph 2 alleges:

> **From September 15, 2015 to present, the FC Defendants -- first acting alone and then in concert with the Forum Defendants, Presidential REIT and Presidential OP -- have engaged in a fraudulent scheme (the "Fraudulent Scheme") to take control of First Capital REIT (a publicly registered fully reporting 1933 and 1934 Act public company that is organized as a real estate investment trust), and use First Capital REIT to divert monies for their own purposes. This activity has harmed First Capital REIT and all of its shareholders, First Capital OP and all of its limited partners, and additionally has resulted in unique damages to Plaintiffs as creditors. (Emphasis added.)**

FAC ¶ 2. *Kronos* is also distinguishable on its facts for at least two reasons. First, the dispute in *Kronos* centered on whether a claim for tortious inducement to breach a contract was time barred. *Kronos*, 81 N.Y.2d at 92 (stating, "the *sole* question presented [was] whether the cause of action accrued when the contract was breached in 1984") (emphasis added). Here, the claim at issue centers on breach of fiduciary duty, an entirely different claim. The *Kronos* court's analysis is, at best, dictum.

Furthermore, in contrast to Defendants' sweeping application, *Kronos* did not address whether facts stated "on information and belief" are sufficient to withstand a motion to dismiss. Defendants gloss over the portions of the FAC properly alleging damages stemming from the

Forum Defendants' conduct. (FAC ¶¶2, 28, 209). Accordingly, the FAC has sufficiently alleged damages supporting Plaintiffs' aiding and abetting claim.

B. The Complaint Sufficiently Pleads Claims for Fraudulent Conveyance

1. The Complaint States A Claim For Violations Of DCL § 276 Against The FC Defendants And The Forum Defendants

The Tenth Claim alleges that Tilden's payment of $3.5 million to the Forum Defendants was fraudulent as to Plaintiffs Frydman and JFURTI. The FC and Forum Defendants seek dismissal of the Tenth Claim because it allegedly (1) fails to state the Forum Defendants' actual intent to hinder, delay or defraud creditors; (2) fails to allege the "badges of fraud" sufficient to establish a violation of § 276; (3) fails to adequately allege that the transfer was not in the ordinary course and/or rendered the First Capital entities unable to meet their obligations; (4) fails to state how the Forum Defendants benefitted from the transfer of $3.5 million to them; and (5) allegations of inadequate consideration are inconsistent with the express terms of the $2.5 million Note (which was provided to the plaintiffs for the very first time in connection with Defendants' motion to dismiss).

In order to state a claim for fraudulent conveyance pursuant to DCL § 276, a plaintiff must allege that (1) the thing transferred has value out of which the creditor could have realized some portion of his claim, (2) that this thing was transferred or disposed of by the debtor, and (3) the transfer was done with actual intent to defraud. *Fly Shoes S.R.L. v. Bettye Muller Designs Inc.*, No. 14 Civ. 10078, 2015 U.S. Dist. LEXIS 87754, at *10 (S.D.N.Y. July 6, 2015) (quoting *In re Flutie N.Y. Corp.*, 310 B.R. 31, 56 (Bankr. S.D.N.Y. 2004)).

First, the FAC plainly alleges, with specificity, the who, what, when, where and how of the fraud. *Kane ex rel. United States v. Healthfirst, Inc.*, 120 F. Supp. 3d 370, 382 (S.D.N.Y. 2015) ("Rule 9(b) requires that a plaintiff set forth the who, what, when, where and how of the alleged fraud.”). The FAC alleges that Plaintiffs lent the FC Defendants $16 million in September 2016 (FAC at ¶ 6); that payments on the loan were to be furnished by Defendants every month (*Id.* at ¶ 26(h)); that no payments were made in October or November 2016 (*Id.*); that instead of paying the Plaintiffs the funds they acknowledged and owed, FC Defendants instead diverted funds from the obligor to an entity with which the obligors had an undisclosed relationship (*Id.* at ¶¶ 26(j), (k)); for example, on September 16, 2016, FC Defendants transferred $3.5 million from Tilden, an indirect wholly-owned subsidiary of First Capital REIT, to Forum Defendants (at ¶¶ 74-81); and that Forum Defendants knew and intended those funds to be paid to themselves in derogation of the rights of the Plaintiffs (FAC at ¶¶ 9, 238). This alone is sufficient to establish fraudulent conveyance under New York law.

Second, in addition to setting forth intent to defraud with specificity, the FAC also alleges multiple “badges of fraud.” Badges of fraud are circumstances so commonly associated with fraudulent transfers that their presence gives rise to an inference of intent. *Will Street Associates v. Brodsky*, 684 N.Y.S.2d 244 (N.Y. App. Div.1999). There is no single exhaustive list of badges of fraud, nor is a particular amount or volume dispositive. *Messer v. Wei Chu (In re Xiang Yong Gao)*, 560 B.R. 50, 63-64 (Bankr. E.D.N.Y. 2016) (citing *In re Kaiser*, 722 F.2d 1574, 1582 (2d Cir. 1983)). Allegations of more than one badge of fraud increases the strength of the inference that an intent to defraud exists. *In re Xiang Yong Gao*, 560 B.R. at 26-27.

All of the following are considered badges of fraud: the secretiveness of the transactions with Forum Defendants (*see In re Grand Jury Subpoena Duces Tecum*, 731 F.2d 1032, 1041 (2d Cir. 1984); *see also* FAC at ¶ 26, 75, 157, 194); the FC Defendants’ knowledge of the Plaintiffs’ claim for $16 million (*Brodsky*, 257 A.D.2d at 529; *see also* FAC at ¶ 208); the fact that the Settlement Agreement was executed in June, a secret agreement was struck with the Forum

Defendants in July, and payments pursuant to the Settlement Agreement ceased by October (*see Drenis v. Haligiannis*, 452 F. Supp. 2d 418, 429 (S.D.N.Y. 2006) (transfer close in time to the occurrence of an event that would require payment by the transferor); *see also* FAC at ¶ 5, 17, 55, 74, 136); and a pattern or series of transactions or course of conduct after each incurring of debt (*In re Kaiser,* 722 F.2d at 1583; *see also* FAC at ¶ 3, 26(f), 65, 115, 125, 143, 161, 194).

Third, contrary to the Defendants' protestations, it is not necessary for a plaintiff to plead inadequacy of consideration or insolvency of the debtor or transferor. *John Deere Shared Servs. v. Success Apparel LLC*, No. 15-CV-1146, 2015 U.S. Dist. LEXIS 147560 (S.D.N.Y. Oct. 30, 2015) ("the adequacy of consideration is irrelevant to a claim of actual fraudulent conveyance"); *Golden Budha Corp. v. Canadian Land Co., N.V.*, 931 F.2d 196, 201 (2d Cir. 1991) (under DCL § 276, "insolvency need not be pleaded or proved where a conveyance is attacked as made with intent to defraud creditors"). Nevertheless, it bears noting that the FAC does in fact allege that the $3.5 million payment to the Forum Defendants was without consideration, an allegation which is borne out by the Defendants' own documents, as set forth in greater detail below. FAC at ¶¶ 237-238.

Fourth, any argument that the FAC fails to state the benefit the Forum Defendants derived from the fraudulent conveyance is implausible. The FAC clearly states that the Forum Defendants "loaned" $2.5 million, and almost $3.5 million was paid back to them within 3 months at a return of 160% (FAC at ¶ 76); and the Forum Defendants obtained a significant equity stake in the FC Defendant companies without sufficient consideration. (FAC at ¶ 157) In any event, the so-called "Secured Promissory Note" they submitted in support of their motion to dismiss raises more questions than it answers, and in fact demonstrates additional indicia of fraud. For example, the Note is not a reciprocal agreement – it obligates FCREI (defined in the document as the Borrower) to pay $2.5 million dollars, plus 15% interest, plus a $667,000 exit fee to the Forum Defendants within 60 days of its effective date. In return, the Note does not recite *any* obligation of the Forum Defendants (other than a perfunctory "For Value Received" in the very beginning). In other words, the Defendants' own document (submitted without explanation or context) establishes that the FC Defendants were entering into transactions that would transfer money *out* of the First Capital companies, to the Forum companies, without any consideration at all.[14/]

Added to these glaring irregularities are the facts that the alleged Secured Promissory Note obligation was paid by a different entity than any listed in the document itself, and the 2-3 month loan of $2.5 million cost the FC Defendants almost an additional $1 million in interest and fees, *at the expense of Plaintiff, whose pre-existing debt went unpaid in favor of a gratuitous $3.5 million payment to the Forum Defendants*, and the result is a transaction replete with multiple badges of fraud, all of which are adequately alleged in the FAC.

2. The Eleventh Cause Of Action States A Claim For Violations Of DCL § 276 Against The FC Defendants, Presidential REIT And Presidential OP

Defendants' only argument against setting aside the sale to Presidential REIT and Presidential OP is that the sale has not yet occurred, and the Court cannot prospectively enjoin a fraudulent transfer. Unsurprisingly, Defendants cite no precedent for their position, because it happens to be contrary to prevailing law. In fact, the New York Debtor and Creditor Law expressly authorizes injunctive relief for future fraudulent conveyances. *See e.g., Knopf v. Meister, Seelig & Fein, LLP*, No. 15cv5090 (DLC), 2016 U.S. Dist. LEXIS 37079, at *20

[14/] Discovery in this matter may well establish that the alleged Secured Promissory Note is one of a series of documents exchanged by and between the FC Defendants and the Forum Defendants. But at the pleading stage, Plaintiffs have no way of knowing what obligations – if any – are contained in those other documents, and whether or not the consideration – if any – was adequate.

(S.D.N.Y. Mar. 22, 2016) (a claim under the DCL may "enjoin *any future* fraudulent conveyance"); *Republic of Philippines v. Marcos*, 806 F.2d 344, 356 (2d Cir. 1986) (emphasis added; citations omitted) (District Court has the power to "prevent a defendant from making a judgment uncollectible" and "to *prevent any transfer* or encumbrance of the properties that would place them beyond [the creditor's] reach or would prevent reconveyance of the properties to [the creditor]"); *Cruden v. Bank of N.Y.*, 957 F.2d 961, 974 (2d Cir. 1992) ("A debenture holder is not required to stand by helplessly until a distant maturity date arrives while his debtor is fraudulently depleted of all its assets.")

Therefore, Defendants' protests to the contrary, the FAC sufficiently pleads fraudulent conveyance with actual intent to hinder, delay or defraud Frydman and JFURTI.

3. The FAC Also States A Claim To Enjoin The Sale Of Assets To Presidential REIT And Presidential OP In Violation Of The Settlement Agreement, The Master Agreement And N.Y. Debtor And Creditor Law § 279

Defendants state that the Twelfth and Thirteenth claims fail because Plaintiffs cannot establish the "likelihood of success on the merits" prong of the elements of injunctive relief. For the reasons set forth below, Defendants' pattern of conduct alone is sufficient to establish Plaintiffs' likelihood of succeeding on the merits.

Plaintiffs have set forth a detailed, *prima facie* case that Singal and First Capital Real Estate Investments, LLC breached the Settlement Agreement, the Master Agreement, and various provisions of the N.Y. Debtor and Creditor Law (*see* §§ B(1)-(2) above). Furthermore, Plaintiffs' allegations establish that the FC Defendants have long been unwilling or unable to pay their debts to the Plaintiffs. For example, the Master Agreement was executed in September 14, 2015, and following its execution, the FC Defendants immediately breached it. FAC at ¶ 162(f), 234, 235. Solely on account of Frydman and JFURTI's forbearance, the parties re-negotiated their deal *three* times, in order to provide the FC Defendants with opportunities to pay. *Id.* at ¶ 53. The FC Defendants acknowledged their breach and entered into the Settlement Agreement on June 2, 2016, which inter alia required the FC Defendants to make monthly payments on the $16 million loan by Plaintiffs. In a mere three months, the monthly payments ceased. FAC at ¶ 26(g), (h). In the three short months between executing the Settlement Agreement and ceasing payments to Plaintiffs, the FC Defendants acquired additional debt – over $17 million of debt from the Forum Defendants alone – and made payments on that debt (at exorbitant rates of return – as high as 160% in the case of a Forum Defendant loan) despite the fact that the JFURTI loan had first priority. FAC at ¶ 76, 287.

Put differently, the FC Defendants have constantly and consistently avoided paying for their acquisition of the First Capital-branded companies, while entering into transactions with multiple other entities in order to strip assets from their businesses, and leave them as shells from which the Plaintiffs will never be able to collect. Section 279 of the New York Debtor and Creditor Law was designed to prevent precisely that eventuality. *See* N.Y. Debt. & Cred. Law § 279; *see also Cruden v. Bank of N.Y.*, 957 F.2d 961, 974 (2d Cir. 1992); *Ostashko v. Ostashko*, No. 00-CV-7162 (ARR), 2002 U.S. Dist. LEXIS 27015, at *79 (E.D.N.Y. Dec. 10, 2002) ("As the section [279] states, a creditor with unmatured claims . . . may request the court to set aside a fraudulent conveyance against the interests of a person or entity against whom the creditor could proceed if his claim had matured").

In light of these facts, it is hard to fathom how Defendants can argue that the First Amended Complaint does not establish the Plaintiffs' likelihood of success on the merits of all their claims, particularly breach of contract, fraudulent conveyance, waste, mismanagement and statutory fraud.

C. Plaintiffs Have Sufficiently Alleged Contract Claims

Plaintiffs' Eighth and Ninth causes of action alleging breach of the Pledge Agreement and Settlement Agreement respectively have been sufficiently plead, and should not be dismissed.

1. The FC Defendants Breached the Settlement Agreement

Plaintiffs allege that the FC Defendants[15] breached Section 7.10(b) of the Master Agreement which is incorporated by reference into the Settlement Agreement, whereby the FC Defendants expressly agreed to not take any action, or fail to take any action which does, or is in any way intended to, limit, diminish, hinder, impact negatively, circumvent, or otherwise directly or indirectly curtain, or attempt to curtail, and will not permit the Companies or any of their employees from acting or failing to act in any fashion which, may or does, or is intended to, limit, diminish, hinder, impact negatively, circumvent or otherwise directly or indirectly curtain or attempt to curtail, any of the rights reserved by and for the benefit of [Plaintiffs] and Plaintiff's Affiliates.

FAC at ¶ 231; FAC, Levine Decl., Ex. K-1.

The FC Defendant contend that the "FAC contains no explanation of how the alleged breach of the Settlement Agreement results in any monetary damages to them at all," losing sight of Plaintiffs' minimal pleading burden with respect to damages. In fact, "under New York Law, although the evidence of damages may be slight, [t]hat damages are uncertain, *or may not even exist*, is an insufficient reason to grant a motion to dismiss." *Okla. Police Pension & Ret. Sys. v. United States Bank Nat'l Ass'n*, 291 F.R.D. 47, 71 (S.D.N.Y. 2013) (emphasis added) (internal citation omitted). In any event, the FAC extensively alleges the injuries sustained by Plaintiffs as a result of FC Defendants' dissipation of assets, fraudulent conveyances, and other wrongdoing in violation of this provision of the Settlement Agreement. As such, Plaintiffs have sufficiently pled damages with respect to their breach of contract claim.

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[15] To the extent this claim is alleged in the FAC against FC Defendants who are not parties to the Settlement Agreement, Plaintiffs hereby withdraw this claim only as to those parties.

The FC Defendants also take issue with the fact that Section 7.10(b) does not, in and of itself, provide for any specific collection remedies under the Settlement Agreement. They argue that because this provision is not one that "clearly define[s] the collection remedies" that are otherwise available to Plaintiffs under the agreement, a breach of this provision cannot independently allow for recovery. Singal MTD at p. 69. This argument is not only disingenuous, but it also serves as an attempt to undermine Plaintiffs' fundamental benefit of the bargain under the Settlement Agreement.

New York Courts have long held that "[a] contract should be read to give effect to all of its provisions." *God's Battalion of Prayer Pentecostal Church, Inc. v. Miele Assoc.*, LLP, 6 N.Y.3d 371, 374 (2006). That sentiment not only includes contractual provisions that explicitly provide for "collection remedies," as the FC Defendants have suggested, but all provisions contained within a contract. *Cruden v. Bank of N.Y.*, 957 F.2d 961, 976 (2d Cir. 1992) ("[T]he entire contract must be considered, and all parts of it reconciled, if possible, in order to avoid an inconsistency."). This is especially true where reading certain provisions in an agreement to the exclusion of others would deprive one party of the benefit of their bargain. *See, e.g., Ronnen v. Ajax Elec. Motor Corp.*, 88 N.Y.2d 582, 590 (1996) (refusing to adopt interpretation that would "take away from Norry the bargained for management rights and privileges" specifically conferred on him elsewhere in the agreement).

By actively engaging in acts to dissipate First Capital REIT's assets, thereby extinguishing the assets over which Plaintiffs would be able attach liability and thus recover under the Settlement Agreement, the FC Defendants have expressly engaged in practices that Section 7.10(b) of the Master Agreement was intended to prohibit. To overlook this clearly alleged and adequately supported breach of the Settlement Agreement because the breached provision did not expressly set forth collection remedies would undermine the fundamental tenets of contract interpretation. *Lockheed Martin Corp. v. Retail Holdings, N.V.*, 639 F.3d 63, 69 (2d Cir. 2011) ("It is axiomatic under New York law … that the fundamental objective of contract interpretation is to give effect to the expressed intentions of the parties.") (internal marks and citation omitted).

2. The FC Defendants Breached the Pledge Agreement

Plaintiffs' Eighth Claim seeks to enforce a right to which Plaintiffs are entitled under the Pledge Agreement, a right which the FC Defendants have prevented Plaintiffs from asserting.[16] Section 7.1 of the Pledge Agreement states that "if an Event of Default shall occur, then all such Collateral at Lender's option, shall be registered in the name of the Lender or its nominee (if not already so registered) and Lender or its nominee may thereafter exercise all rights and privileges as the owner thereof." Levine Decl., Ex. L § 7.1.

As Plaintiffs have expressed throughout the FAC, they are concerned Defendants are not only dissipating the remaining assets in the possession of First Capital REIT, but also that Defendants have transferred valuable assets from "First Capital REIT, free and clear of liability to Plaintiffs, to a new entity controlled by Singal and the Forum Defendants." FAC at ¶ 26(c), 73, 101-121, 159, 194, 195, 197, 198, 208, 232. These actions, orchestrated in large part by the

[16] Section 1.3 of the Promissory Note states that "The Borrower Parties shall make payments to Lender, of interest only on June 15, 2016, and on the fifteenth (15^{th}) day of each succeeding month," and that failure to pay these amounts constitute an event of default. Levine Decl., Ex. L at Ex. A §1.3; Levine Decl., Ex. L at Ex. B § 5.1(a). FC Defendants do not refute Plaintiffs' allegations that they failed to make the required interest payments in October and November of 2016 or that Plaintiffs complied with their notice to cure obligations under the agreement. FAC at ¶ 224.

FC Defendants, diminish the possibility that Plaintiffs will ever collect on the Note as well as severely decrease the value of the pledged Collateral that Plaintiffs currently retain as security on that Note. Because the FC Defendants refuse to convert the registration of Common Stock to JFURTI's name, Plaintiffs continue to be precluded from pursuing any course of action that would provide them the benefit for which they bargained as security in the Pledge Agreement.

That Plaintiffs seek to enforce this right pursuant to the Pledge Agreement is not inconsistent, as Defendants argue, with Plaintiffs' assertion before Judge Sherwood that the instant action "is primarily a derivative lawsuit brought to remedy RICO and Securities law violations, in which state law claims are asserted, but not for *default and acceleration* under the Note at all." Singal MTD at p. 68 (Emphasis added). Rather, Plaintiffs seek security – not default and acceleration remedies. Indeed, Defendants' RICO and Securities law violations are the precise reason that Plaintiffs now seek to exercise their right under Section 7.1 of the Pledge Agreement to register the Collateral in their name and secure what remains of the benefit of the bargain they made with the FC Defendants under the Note. Notably, the Plaintiffs have not sought to have the shares registered to JFURTI in the Action before Judge Sherwood, and therefore there is no legitimate argument about duplication.

D. The FAC Adequately Alleges Conversion

In addition to repeating their unsupported allegation that Plaintiffs lack derivative standing to assert a conversion claim on behalf of First Capital REIT and First Capital OP against the FC Defendants, addressed herein at *supra* Section III(C), Defendants also contend that Plaintiffs' derivative conversion claim fails as it "fail[s] to identify the specific funds that form the[] conversion claims." Singal MTD p. 71. Defendants miss the mark with respect to Plaintiffs' pleading requirement. "The relevant question at the motion-to-dismiss stage is not whether Plaintiffs have alleged an exact sum of money in their complaint… Rather, the question is whether the money alleged to have been converted is specifically '*identifiable*' or, put another way, whether it is capable of being described or identified in the same manner as specific chattel." *Grgurev v. Licul*, 2017 U.S. Dist. LEXIS 11090, at *34 (S.D.N.Y. Jan. 26, 2017); *see also Youngblood v. East Neck Nursing Ctr., Inc.,* No. 5383/14 (PJS), 2014 N.Y. Misc. LEXIS 5456, at *9 (Sup. Ct. Dec. 3, 2014). Even though "Plaintiffs' conversion claim must *ultimately* be reduced to a definite sum of money, that can be accomplished through discovery." *Grgurev v. Licul*, 2017 U.S. Dist. LEXIS at *36 (finding "[t]he allegations that Defendants took control over and misused a particular pot of money that rightfully belonged to Ocinomled are sufficient to survive a motion to dismiss") (emphasis added). As such, Plaintiffs' claims that the FC Defendants "have taken for their own benefit, and/or misused, cash assets belonging to First Capital REIT and First Capital OP, and in addition, have given over certain of those cash assets to the Forum Defendants," including but not limited to the $17 million raised through a "public offering of common stock of First Capital REIT" between September 15, 2015 and February 28, 2016, are sufficient to withstand a motion to dismiss. FAC 26(c), 265.

E. Plaintiff Has Sufficiently Plead Aiding and Abetting Conversion on Behalf of First Capital REIT and First Capital OP against the Forum Defendants

Plaintiffs have also adequately plead a derivative claim for aiding and abetting conversion on behalf of First Capital REIT and First Capital OP against the Forum Defendants. "To prove that a defendant aided and abetted a conversion, a plaintiff must show the existence of a primary violation, actual knowledge of the violation on the part of the aider and abettor, and substantial assistance." *Amusement Indus. v. Buchanan Ingersoll & Rooney, P.C.*, 2012 U.S. Dist. LEXIS 50527, at *24 (S.D.N.Y. Apr. 10, 2012). Plaintiffs have plead each element as to the Forum Defendants.

As discussed herein, *supra* pp. 82-83, Plaintiffs have adequately alleged a derivative conversion claim on behalf of First Capital REIT and First Capital OP. Furthermore, Plaintiffs have adequately alleged that the Forum Defendants had knowledge of the conversion and provided substantial assistance to further the conversion of assets from First Capital REIT and First Capital OP. For example, on or about July 12, 2016 the Forum Defendants provided a $2.5 million loan to First Capital Real Estate Investments LLC on unconscionable terms, ultimately obtaining an "interest yield of more than one hundred sixty percent (160%) per annum" by the time the loan was paid off – only ninety (90) days from the date of the loan. FAC at ¶ 76; *see also* Platt Decl., Ex. 1. Such high interest yields on loans are unconscionable, and had the loan been for only $.01 less it would have constituted criminal usury under New York law, a class C felony. *Adduci v. Krane*, No. 13-1104-AK, 2015 U.S. Dist. LEXIS 13078, *6-7 (D.D.C. February 4, 2015) (finding loan exit fee that equated to 900% interest rate unreasonable and against public policy); NY Penal Law § 190.42. Plaintiffs also allege that the Forum Defendants' other loan to First Capital REIT for $15 million dollars "has been structured in a way, which makes it highly likely that the FC Defendants and/or related FC entities will default and give rise to the Forum Defendants' right to foreclose on that collateral." FAC ¶205. Moreover, the Forum Defendants, as sophisticated investors, were undoubtedly aware that such loan terms were highly detrimental to First Capital REIT and First Capital OP and would dissipate First Capital REIT's assets. *Merrill Lynch & Co. v. Allegheny Energy, Inc.*, 500 F.3d 171, 181 (2d Cir. 2007) ("Both parties before us are sophisticated business entities that are held to a high standard of conduct in the events leading up to the sale and purchase of" the company). As such, Plaintiffs allegations are sufficient to survive a motion to dismiss.

F. Plaintiffs Are Entitled To Sue Derivatively For An Accounting And Have Adequately Plead This Claim

Plaintiffs have adequately set forth a cause of action for accounting against the FC Defendants. Not only are Plaintiffs adequate representatives with standing to sue on behalf of First Capital REIT, *supra* Section III(C), but Plaintiffs and other similarly situated stockholders and unitholders also have no other adequate remedies at law to determine "(a) whether First Capital REIT had the ability to pay the mortgages on which it defaulted; (b) the amount, location, and use of all investments obtained during the September 15, - February 28, 2016 offering; the origin of the funds wired from Tilden to the Forum Defendants and the justification for wiring of funds; and (d) any and all additional transactions between any of the FC Defendants or their affiliates on the one hand and any of the Forum Defendants or their affiliates, on the other." FAC at ¶ 285. Such a circumstance is quintessentially the reason a cause of action for accounting exists – to provide an avenue for discovery to an aggrieved party where one would otherwise not exist. *See P.V. Properties, Inc. v. Rock Creek Village Associates Ltd. Partnership*, 77 Md. App. 77, 89 (Md. Ct. Spec. App. 1988) ("An accounting may be had where one party is under an obligation to pay money to another based upon facts and records which are known and kept exclusively by the party [from] whom the obligation is owed, or where there is a confidential or fiduciary relation between the parties, and a duty rests upon the defendant to render an account."); *see also Dormay Constr. Corp. v. Doric Co.*, 221 Md. 145, 153 (Md. 1959) ("relationship of trust and confidence sufficient to entitle" accounting by realtor of sales records in the possession of developer).

Nor have Plaintiffs failed to allege demand futility, to the extent such pleading is even required. Supra at pp. 30-31. In addition to actually making unsuccessful written demands for an accounting, *see* FAC at ¶ 26(c), Plaintiffs allege that "First Capital REIT's board of directors, as of the time this Action was brought and currently, were all hand-picked by Singal. All or a majority of such board members are interested in the foregoing transactions and, cannot reasonably be expected to respond to a demand to initiate this Action in good faith and within the ambit of the business judgment rule, and as such, any demand would be futile." FAC at ¶ 145. These allegations are sufficient to withstand a motion to dismiss. Furthermore, in light of the FC Defendants' active dissipation of First Capital REIT assets at an alarming rate, and their participation in the fraudulent scheme aimed at relocating and harboring First Capital REIT's valuable assets, demanding an accounting and allowing the FC Defendants time to respond would serve only to further stall any finality to the FC Defendants' scheme.

G. Declaratory Judgment

1. Plaintiff's Seventh Cause Of Action Is Not Moot And Should Not Be Dismissed

Defendants misrepresent, or misunderstand, Plaintiffs' Seventh Claim seeking a declaratory judgment on the conversion of 1,456,827.58 OP Units into shares of common stock. Plaintiffs are not alleging the conversion did not happen at all, nor does the dismissal of Phoenix American Financial Services, Inc. obviate in any way the need for a declaration of Plaintiffs' rights.

Section 8 of the Settlement Agreement sets forth, in pertinent part, that JFURTI… shall … have First Capital Option, from time to time after September 15, 2016, to cause the conversion of all or any of First Capital OP Units held as collateral under the Security Agreement, to common shares of First Capital REIT on a *one-for-one basis*… Should … [JFURTI] elect to exercise the right herein granted, [JFUTI] shall, from time to time, provide First Capital REIT with written notice of their election and identify the number of OP Units being converted to common stock of First Capital REIT at that time, and First Capital REIT shall direct its transfer agent to issue one share of common stock for each OP Unit converted, and deliver to … [JFURTI] evidence of same together with share certificates (or other evidence) within thirty (30) days of the date of said exercise notice." FAC ¶ 133 (Emphasis added); Levine Decl., Ex. L. On or about August 16, 2016, JFURTI provided First Capital REIT with written notice that it was electing to convert all of its OP Units to common shares effective September 16, 2016 – the first day it was allowed to do so pursuant to Section 8 of the Settlement Agreement – giving First Capital REIT over a month to prepare for execution of this conversion. FAC ¶ 134, 218.

Despite the substantial notice, and in violation of Plaintiffs' rights pursuant to the Settlement Agreement, the FC Defendants – without explanation – refused to convert JFURTI's OP Units to common shares units until almost a month later. FAC ¶ 136. Furthermore, when the FC Defendants finally converted First Capital OP Units to common shares, they converted the shares based on an attribution share price of less than $12.49 instead of the "one-for-one" basis as set forth in the Settlement Agreement. FAC ¶ 135. As a result of the FC Defendants' refusal to timely comply with the Settlement Agreement and convert First Capital OP Units to common shares on or about September 16, 2016 on a one-for-one basis, when the published NAV of First Capital REIT common shares was $16.03, FC Defendants' inexcusable delay and application of a faulty attribution conversion rate resulted in a net effective loss for Plaintiffs of over $5 million dollars. FAC at ¶¶ 26(l), 135, 220.

Plaintiffs accordingly have sufficiently alleged their right to a declaration that, pursuant to Section 8 of the Settlement Agreement, they converted their OP units into shares of common stock and effectively did so as of September 16, 2016 at a NAV of $16.03 per unit/share. The Declaratory Judgment Act expressly allows for such a declaration of rights. 28 USCS § 2201 ("any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration"); *see also Associated Indem. Corp. v. Fairchild Industries, Inc.*, 961 F.2d 32, 35 (2d Cir. 1992) ("a declaratory judgment is available to resolve a real question of conflicting legal interests") (internal citation omitted). That is exactly what Plaintiffs seek here, a declaration of conflicting legal interests, and as such this cause of action is properly before the Court.

H. Plaintiffs Have Sufficiently Stated a Claim of Tortious Interference Claim Against Forum Defendants, Presidential REIT, and Presidential OP

Plaintiffs' Sixth Claim for tortious interference against the Forum Defendants, Presidential REIT, and Presidential OP are sufficiently alleged for the purposes of a motion to dismiss. "Under New York law, the elements of a tortious interference with contract claim are (a) that a valid contract exists; (b) that a 'third party' had knowledge of the contract; (c) that the third party intentionally and improperly procured the breach of the contract; and (d) that the breach resulted in damage to the plaintiff." *Cohen v. Davis*, 926 F. Supp. 399, 402 (S.D.N.Y. 1996). Plaintiffs have sufficiently alleged each of these elements with respect to each party, regardless of whether certain allegations are plead upon information and belief. *See, e.g., John R. Loftus v. White*, 150 A.D. 2d 857, 859-860 (App. Div. 3d. Dep't 1989) (crediting, for purposes of the motion to dismiss, hearsay allegations, noting "Loftus could not provide more detailed factual information since it appears that information was unique to the Whites and Klersy and unavailable to Loftus").

Defendants do not contest the validity of the underlying contract – the Settlement Agreement – and do not appear to contest any Defendants' knowledge thereof. Defendants do take issue with Plaintiffs' damages allegations as well as Plaintiffs' allegations that Defendants intentionally procured the breach of the Settlement Agreement. In doing so, Defendants again misconstrue Plaintiffs' pleading obligations.

First, Plaintiffs' have met their pleading obligations with respect to damages by alleging that "[a]s a direct and proximate result of the Forum Defendants', Presidential REIT's and Presidential OP's wrongful and tortious interference Plaintiffs have sustained and will sustain significant damages." FAC at ¶215. Those damages include, but are not limited to, Plaintiffs being deprived of receiving "timely monthly interest payments" on the Note, which interest payments they have not received since October 2016. FAC at ¶¶223-224. This is sufficient to withstand a motion to dismiss. *See, e.g.*, Cerberus Capital Mgt., L.P. v. Snelling & Snelling, Inc., 12 Misc. 3d 1187(A), 1187A (N.Y. Sup. Ct. 2005) (fees and expenses are legally recoverable under a tortious interference claim and thus allegations of such are sufficient to withstand a motion to dismiss).; *see also Ullmannglass v Oneida, Ltd.*, 86 A.D.3d 827, 829 (N.Y. App. Div. 3d Dep't 2011) (allegation that plaintiffs "suffered … substantial monetary loss from lost commissions and sales of goods and services," damages that directly flowed from the breached agreement, were sufficient to withstand a motion to dismiss).

Plaintiffs have also sufficiently alleged that the Forum Defendants, Presidential REIT, and Presidential OP all intentionally procured the breach of the Settlement Agreement by:

- "knowingly providing assistance to First Capital REIT in undertaking the sale to Presidential REIT, which results in assets being diverted away from First Capital REIT and the First Capital Borrower and Guarantors," and
- "acquiring, or negotiating to acquire ownership of Class A shares in Presidential REIT, either alone, or together with Singal and some of the other FC Defendants, in order to, *inter alia*, cause Presidential REIT to enter into new advisory and property management agreements with new entities, for the purpose of depriving First Capital Advisor and FCREI of revenue to be able to pay the obligations to

> Plaintiffs, and for the purpose of making impossible for Plaintiffs to collect from First Capital Advisor, FCREI or First Capital Borrower and Guarantors."

FAC at ¶214.

Additionally, the Forum Defendants' loaned $2.5 million dollars to First Capital REIT as of July 12, 2016, and were paid back with an interest yield of more than 160%, totaling almost $3.5 million dollars, just days before Defendants breached the Settlement Agreement with Plaintiffs by failing to make the required interest payment on October 15, 2016. FAC ¶¶76, 85; FAC Levine Decl., Ex. L. The fact that Defendants were unable to pay Plaintiffs interest pursuant to the Settlement Agreement on October 15, 2016, but mere days prior were able to repay the Forum Defendants' $2.5 million dollar loan *and* the almost $1 million dollars that had accrued in interest and fees within 90 lifespan of the note strongly suggests the Forum Defendants were the "but for" cause of Defendants' inability to pay Plaintiffs. *See, e.g., Rosetti Handbags & Accessories, Ltd. v Hersh*, 2011 N.Y. Misc. LEXIS 6889, at *13-14 (N.Y. Sup. Ct. June 16, 2011) (inferring but for causation from allegations in complaint, noting "cognizable claim for tortious interference does not require an allegation that the defendant's conduct was the sole proximate cause of the alleged harm"); *see also Blank v. Baronowski*, 959 F. Supp. 172, 179 (S.D.N.Y. 1997) ("the absence of specific factual allegations with regard to times, locations and precise statements or acts by the defendants does not require dismissal" of the tortious interference claim). Having adequately alleged each element against all the Forum Defendants, Presidential REIT, and Presidential OP, Defendants' collective request to dismiss Plaintiffs' tortious interference claim should be denied.

I. Plaintiffs Have Stated A Claim For Unjust Enrichment

Defendants contend that Plaintiffs are precluded, at this early stage, from alternatively pleading claims of unjust enrichment in addition to claims of breach of contract. That is inaccurate. "A party may state as many separate claims or defenses as it has, regardless of consistency." *Fly Shoes S.R.L. v. Bettye Muller Designs Inc.*, 2015 U.S. Dist. LEXIS 87754, at *13 (S.D.N.Y. July 6, 2015) (denying motion to dismiss unjust enrichment claim as duplicative of breach of contract claim).

CONCLUSION

For the foregoing reasons, and based on the entire record of this case, Plaintiffs respectfully request that Defendants' motion must be denied in its entirety. In the alternative, Plaintiffs should be granted leave to correct any technical deficiencies in the First Amended Complaint.

Dated: New York, New York
March 24, 2017

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